

2018

Towards an intersectional model of policy development, advocacy and journalism: Negotiating freedom of expression in public

Julie Posetti
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Towards an intersectional model of policy development, advocacy and journalism: Negotiating freedom of expression in public

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Prof. Stephen Tanner

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This thesis is presented as part of the requirement for the conferral of the degree:

Doctor of Philosophy

This research has been conducted with the support of the Australian Government Research Training
Program Scholarship

University of Wollongong

Faculty of Law, Humanities and the Arts: School of the Arts, English and Media

August 2018

Abstract

This practice-based PhD thesis presents a major work of hybrid journalism-policy research - the candidate's UNESCO-published study *Protecting Journalism Sources in the Digital Age*¹ (Posetti 2017a²) - and associated outputs (including journalism, industry reports, and public events), together with this critical and connective exegesis that provides theoretical and reflective context for the major artefact (i.e. aforementioned book) at the core of the project. The United Nations Educational, Scientific and Cultural Organization (UNESCO) commissioned the major artefact in 2014 to provide quantitative data and qualitative research to demonstrate international developments in legal and normative frameworks that support the principle of confidential source protection which is central to the practice of investigative journalism, with an emphasis on emerging digital era implications. The resulting book, published by UNESCO in 2017, examined a decade's worth of relevant source protection developments in 121 countries. Its impact was significant, as evidenced by international media coverage, citation in a major judgement on journalistic source protection from the European Court of Human Rights, through a Report from the UN Secretary General, and via a UN General Assembly Resolution on journalism safety. Described by UNESCO as a "benchmark study" (UNESCO 2017a), the book makes a major contribution to this emerging area of scholarship, especially through its development of a comprehensive 11-point framework for assessing legal source protection instruments and normative environments. It is the first study of its kind to map and analyse the convergent digital era threats posed to source protection globally. These laws and frameworks sit at the complex intersection of a range of threats involving: the undercutting of source confidentiality by mass and targeted surveillance; the risk of source protection laws being trumped by national security and anti-terrorism legislation; the expanding requirements for third party intermediaries to mandatorily retain (and potentially handover) citizens' data for increasingly lengthy periods of time; and debates about diverse digital media actors' entitlement to access source protection laws where they exist. This exegesis provides a critically reflective account of the development of the study (i.e. *Protecting Journalism Sources in the Digital Age*) as a hybrid work of journalism and international public policy research. It presents a theoretical account of the scholarship around source protection, the fraught history of the UN's role in commissioning research designed to develop international freedom of expression rights and standards, and the shifting nature of journalism and press freedom

¹ The book is appended to this exegesis as a PDF: Appendix 2

² Note: The book that sits at the centre of this PhD project was sole-authored by the candidate

advocacy in the networked public sphere. It describes the act of ‘making content out of process’ and maximising research impact through the extended life of the project. This involved interwoven collaborations, engaging stakeholder communities and broader publics in the research and dissemination processes, explaining and promoting the study’s findings, and carefully negotiating iterative publication through protracted UN diplomatic and bureaucratic processes. Together, this critical reflection and scholarly analysis form the exegetical thesis, explicating the hybrid model of networked public communication at the heart of the production, publication and impact of the UNESCO-published study *Protecting Journalism Sources in the Digital Age*.

Acknowledgments

This PhD project would not have been possible without the love, support and sacrifices of my husband and daughter. So, Tim and Amalia: this is for you. It is also submitted with recognition of the patient, encouraging and insightful supervision of Professor Stephen Tanner and Associate Professor Marcus O'Donnell. Sincere thanks also go to my mother and sister who loyally helped 'pick up the pieces' during the last phases of PhD deadline push. Finally, I would like to express gratitude for the contributions of the myriad researchers, research assistants, peer reviewers, expert interviewees³ and UNESCO staff⁴ affiliated with the development of the book at the heart of this project: *Protecting Journalism Sources in the Digital Age* (Posetti 2017a). My sincere hope is that this PhD, in its multiple intersecting components, will serve investigative journalism, help support the development and maintenance of open societies through sustainable accountability journalism, and draw attention to the importance of the public's 'right to know', along with journalism's role in defending it. Additionally, I hope it ultimately aids the vital research and advocacy on press freedom, journalism safety and media literacy undertaken and supported by UNESCO's Freedom of Expression and Media Development Division.⁵

Julie Posetti, August 2018

³ For a full list of researchers, research assistants, review panel members and expert interviewees connected to the UNESCO study, see the imprint and appendices within *Protecting Journalism Sources in the Digital Age* (appended in full to this exegesis and also available here: <http://unesdoc.unesco.org/images/0024/002480/248054E.pdf>). The book is sole-authored by the candidate, who was also the project's Chief Researcher.

⁴ Particular thanks go to Dr Guy Berger and Caroline Hammarberg

⁵ Disclaimer: This body of work is the responsibility of the author, and the ideas and opinions expressed in it are not those of UNESCO, and they do not commit the Organization

Certification

I, Julie Nicole Posetti, declare that this thesis submitted in fulfilment of the requirements for the conferral of the degree Doctor of Philosophy, from the University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. This document has not been submitted for qualifications at any other academic institution.

Julie Nicole Posetti

31st August 2017

List of Names and Abbreviations

Exegesis Informants⁶

Dr Guy Berger, Director of Freedom of Expression and Media Development, UNESCO

Prof. David Kaye, UN Special Rapporteur

Dr Courtney Radsch, Advocacy Director, CPJ

James Risen, Investigative journalist, The Intercept

Abbreviations

ABC – Australian Broadcasting Corporation

CPJ – Committee to Protect Journalists

NWICO – New World International Communication Order

UN – United Nations

UNESCO – United Nations Education, Scientific and Cultural Organization

UN GA – United Nations General Assembly

UN AOC – United Nations Alliance of Civilizations

UOW – University of Wollongong

WAN-IFRA – World Association of News Publishers

WEF – World Editors Forum

⁶ See also list of interviews at the end of the ‘major artefact’ attached (Appendix 2)

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Prologue

“Will you listen to my story?” he asked. It was 11pm on a Sunday in 1996, and I had almost let the phone ring out as I walked towards the door at the end of my shift as an Australian Broadcasting Corporation (ABC) reporter in Sydney. But the tone of desperation in his broad Australian-accented voice – a voice that spoke of a life hard-lived – made me sit back down and listen.

‘Shane’ was the survivor of brutal child abuse in state-run children’s homes in the 1970s and ‘80s. I listened for an hour while his voice verged from shaking with rage to choking on tears. The next night, he visited the offices of the ABC’s flagship radio current affairs program *AM* with a thick dossier of evidence that he’d collected over the course of a decade in his quest for justice. He became the pseudonymous confidential source of my investigative series on child abuse in state care for *AM* that shone a national spotlight on the institutional abuse of children. It led to blanket coverage from competitor news organisations and the New South Wales Premier taking a helicopter to inspect children’s homes around the state. The series was recognised with the 1996 Australian Human Rights Award for Radio.

‘Shane’s’ story was one of many that I produced for the ABC based on confidential sources and whistleblowers that focused on criminal breaches of social justice – from paedophile rings with links to politics and the judiciary, to police inaction on domestic violence. Such stories became the hallmark of my professional journalism career. But they are also a hallmark of my journalism philosophy – a philosophy informed by my own experiences of injustice, including as the survivor of domestic abuse at the hands of my stepfather in the 1980s (Posetti 2013a), at a time when violence against women and children was barely recognised.

These stories put flesh on the lessons I’d learned as a trainee journalist about the importance of confidential sources to investigative journalism - especially journalism with vulnerable humans at its heart. For me, they also personalised one of the cardinal rules of journalism: first, protect your sources.

At the core of my practice is a commitment to social justice and human rights inextricably linked to freedom of expression. This practice is anchored within public broadcasting in the service of the public interest, operating within a tradition of respect for, and collaboration with, engaged audiences. And at the centre of my being is a determination to fight - against censorship, exploitation, injustice, racism, sexism, and bigotry; and for the right to ‘speak truth to power’. Such values naturally situate me as a ‘crusading’ or ‘activist’ journalist. They have drawn me into conflict with powerful figures and organisations - including the Murdoch press in Australia (ABC News 2010)⁷ - and they have at times

⁷ See also: Manne, R (2011) *Bad News*, The Quarterly Essay, Vol 43
<https://www.quarterlyessay.com.au/essay/2011/09/bad-news/extract> [Accessed 20/7/18]; Berger, G (2010) *When*

caused tensions in professional relationships. But they also make me deeply committed to defending the rights of vulnerable confidential sources and whistleblowers, and they make me especially mindful of the potential impacts of my own journalism on them.

These characteristics, traditions and practices followed me into academic research and journalism education. With the advent of social media in the mid 2000s, I adapted my research and teaching instantaneously to accommodate new modes of storytelling, public journalism, audience collaboration, and interactivity. As an early adopter, teacher and researcher of 'Twitter journalism', I brought these intersecting elements together in an experimental public journalism project updated for the Social Media Age, called #ReportingRefugees. (Posetti 2012) This was a highly collaborative and interventionist project, dependent upon intersecting partnerships with the ABC, two Australian universities, refugee support organisations, a social media start-up, and audiences in the networked public sphere. It also involved sensitive and vulnerable sources, including several who required confidentiality. This project represented my first attempt at developing a hybrid approach for negotiating and navigating human rights in public. I further developed this approach in the production of the high-impact international UN study at the core of this PhD project.

The global relationships built around my journalism research and education practice ultimately led to my authorship of *Protecting Journalism Sources in the Digital Age* (Posetti 2017a). In 2007, I won a national prize for innovation in university teaching and learning that resulted in an invitation to South Africa's Rhodes University as a visiting journalism academic. That invitation came from Professor Guy Berger (a former apartheid era political prisoner and activist editor) who was then Head of the School of Journalism and Media Studies at Rhodes, and it represented the beginning of collaborations that have spanned a decade. Two years after Berger moved to Paris as Director for Freedom of Expression and Media Development for UNESCO, I was hired by the Paris-based (and UNESCO-affiliated) civil society and industry organisation World Association of News Publishers (WAN-IFRA) and its World Editors Forum (WEF) to lead research and journalism initiatives as Research Fellow and Research Editor. It was in this context that I ultimately became the author and lead researcher for *Protecting Journalism Sources in the Digital Age*, a study commissioned for UNESCO by Berger. I have since been contracted to co-edit the UNESCO-commissioned book *Journalism, 'Fake News' and Disinformation* with the Executive Director of WEF, Cherilyn Ireton – a book on the cusp of publication as I write in August 2018.⁸

These overlapping, interplaying experiences and practices provide broader context for this PhD project.

Tweets Get Up An Editor's Nose, He Shouldn't Become a Twitter Troll, Mail & Guardian Online: <http://thoughtleader.co.za/guyberger/2010/12/03/when-tweets-get-up-an-editors-nose-he-shouldn%E2%80%99t-become-a-twitter-troll/> [Accessed: 25/8/18] & Rosen, J (2011) *NewsCorp is Bad News*, ABC News: <http://www.abc.net.au/news/2011-11-21/rosen-news-corp-is-bad-news/3683736> [Accessed: 20/7/18].

⁸ Postscript: This handbook was published by UNESCO in September 2018. It is available here: <https://en.unesco.org/fightfakenews>

Behind the scenes is also a story about synergistic opportunities and relationships - between colleagues, friends, professional collaborators and those who occupy places in my life at the intersection of those roles. It is a story of challenges, achievements, and conflicts that arose during the high-stress and high-speed production of a very substantial piece of research, on a contentious subject situated at the confluence of a range of sensitive geopolitical issues.

There are layers of irony and intrigue within this backstory about producing research on threats to investigative journalism and freedom of expression rights for a UN organisation with a fraught history of such research, and a reputation within some sections of civil society as being exposed to censorship. (Sleazak 2016)

But in the end, this is a story about the making of a high-impact public policy book where journalism, human rights advocacy, and research intersect in the networked public sphere. It is a story that converges personal and professional spheres; one which demonstrates a model built on collaboration, engaged audiences, perseverance, determination to push through barriers, global inter-connected relationships, and practice-led research; a model explicated through this exegesis.

Note: This exegetical thesis deploys methodologies and theories associated with autoethnography and reflective practice, and as such a first-person narrative approach is adopted, where appropriate, throughout.

Chapter 1: Introduction

“Privacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law, and such privacy should not be subject to arbitrary or unlawful interference”. (UNESCO 2013)

This practice-led PhD project⁹ features a number of intersecting and interdependent component parts. These are:

1. The major artefact: *Protecting Journalism Sources in the Digital Age* (Posetti 2017a), a substantial work of hybrid journalism-international policy research produced for UNESCO
2. The journalistic and industry research outputs and events produced by the candidate in association with the ‘major artefact’ e.g. journalism produced about the research, commentary on the research, and public events connected to the research (see appended ‘Impact Timeline’)
3. This critical, ‘connective’ research exegesis which provides a theoretical and reflective context for the unique artefact.¹⁰

This chapter introduces each of these elements and their interrelationship in the context of the intersectional model of policy development, advocacy and journalism used to negotiate freedom of expression issues in and through this PhD project. It highlights the key conclusions of the UNESCO study, along with development of the theory of ‘making content out of process’ (Posetti 2013) which underpins the associated outputs. Finally, it outlines the structure and key components of this exegesis.

1.1 The major artefact

The impetus for the major artefact at the core of this project, *Protecting Journalism Sources in the Digital Age* (Posetti 2017a), was a November 2013 UNESCO Resolution which mandated a comprehensive study on internet-related issues. It declared that: “Privacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law, and such privacy should not be subject to arbitrary or unlawful interference.” (UNESCO 2013)

⁹ The project components were produced during the candidate’s enrolment as a PhD student at the University of Wollongong (UOW), in accordance with UOW requirements.

¹⁰ A PDF copy of the book and an ‘impact timeline’ featuring a series of exemplar associated outputs are appended to this exegesis (See appendices 9.1 & 9.2)

I was contracted to undertake the research on behalf of WAN-IFRA/the World Editors Forum (which entered into a contract with UNESCO¹¹) where I was based on secondment from the University of Wollongong (where I was employed as a journalism academic) as Research Fellow and Research Editor during 2014/2015. The major artefact was initially commissioned as a study designed to provide quantitative data and qualitative analysis around legal and normative frameworks supporting journalistic source protection in the context of digital disruption.¹² The original purpose of the commission was twofold: to feed into a broader UNESCO study on the internet and knowledge societies¹³ and the second edition of the Organization's major biannual report, *World Trends in Freedom of Expression and Media Development*¹⁴. However, shortly after I began the research, the complexity and scope of the undertaking expanded significantly as a range of emerging intersecting issues became clear to me, and subsequently to UNESCO. Ultimately, the commission grew into a comprehensive global study of Digital Age source protection issues across 121 countries, requiring the examination of a decade's worth of developments. It was published by UNESCO as a stand-alone 80 thousand-word book in April 2017 as part of the Organization's flagship 'Series on Internet Freedom'¹⁵. Prior to publication in full, it also served as a feeder study for the associated UNESCO publications mentioned above.

Protecting Journalism Sources in the Digital Age highlighted four key inter-related themes for understanding the evolving international regulatory environment and Digital Age impacts of erosion, restriction and compromise. These were (Posetti 2017a p18):

1. *The widespread use of mass and targeted surveillance of journalists and their sources undercutting legal source protection frameworks by intercepting journalistic communications and impacting significantly on investigative journalism practice*¹⁶
2. *The risk of source protection laws being trumped by national security and anti-terrorism legislation that increasingly broadens definitions of 'classified information' and limits exceptions for journalistic acts*

¹¹ Both UNESCO and WAN-IFRA/WEF are based in Paris and WAN-IFRA has special status with UNESCO

¹² Original research contract between UNESCO and WAN-IFRA (the global news publishing association based in Paris that also houses the World Editors Forum) dated August 4th, 2014 (Personal document collection). I led the research in my capacity as WAN-IFRA Research Fellow and WEF Research Editor (2014/2015), with the support of the University of Wollongong, Australia.

¹³ Note: The overarching report triggered by the 2013 UNESCO Resolution known as the 'UNESCO Internet Study' was published in late 2015 as *Keystones to foster inclusive Knowledge Societies: Access to Information and Knowledge, Freedom of Expression, Privacy, and Ethics on a Global Internet*, UNESCO: Paris <http://unesdoc.unesco.org/images/0023/002325/232563E.pdf> [Accessed 14/07/18] It cites *Protecting Journalism Sources in the Digital Age*.

¹⁴ Note: This global study was published in late 2015 as *World Trends in Freedom of Expression and Media Development 2015: Special Digital Focus* (Available at: <http://unesdoc.unesco.org/images/0023/002349/234933e.pdf>) and it features a major pre-publication extract from *Protecting Journalism Sources in the Digital Age*.

¹⁵ Available at: <https://en.unesco.org/unesco-series-on-internet-freedom> [Accessed 13/7/18].

¹⁶ Note: As demonstrated by the case study featured in Posetti J (2017a) *The impact of source protection erosion in the Digital Age on the practice of investigative journalism globally* (pp 103-112). This theme also extends to debate about impacts on journalism practice, newsroom responses, and ethics.

3. *Expanding requirements for third party intermediaries to mandatorily retain (and potentially handover) citizens' data for increasingly lengthy periods of time further exposes journalistic communications with confidential sources*
4. *Debates about journalistic actors' entitlement to access source protection laws where they exist are intensifying internationally in the context of shifting understandings about the range of people who undertake 'acts of journalism'*

A major output of the study was an 11-point framework (Posetti 2017a pp88-89) for assessing source protection dispensations in the Digital Age. The framework embeds significant recommendations, as follows:

1. *Recognise the value to the public interest of source confidentiality protection, with its legal foundation in the right to freedom of expression (including press freedom), and to privacy. These protections should also be embedded within a country's constitution and/or national law,*
2. *Recognise that source protection should extend to all acts of journalism, and across all platforms, services and mediums (of data storage and publication), and that it includes digital data and meta-data,*
3. *Recognise that source protection does not entail registration or licensing of practitioners of journalism,*
4. *Recognise the potential detrimental impact on public interest journalism, and on society, of source-related information being caught up in bulk data recording, tracking, storage and collection,*
5. *Affirm that State and corporate actors (including third party intermediaries) who capture journalistic digital data must treat it confidentially (acknowledging also the desirability of the storage and use of such data being consistent with the general right to privacy),*
6. *Shield acts of journalism from targeted surveillance, data retention and handover of material connected to confidential sources,*
7. *Define exceptions to all the above very narrowly, so as to preserve the principle of source protection as the effective norm and standard,*
8. *Define exceptions as needing to conform to a provision of "necessity" and "proportionality" — in other words, when no alternative to disclosure is possible, when there is greater public interest in disclosure than in protection, and when the terms and extent of disclosure still preserve confidentiality as much as possible,*
9. *Define a transparent and independent judicial process with appeal potential for authorised*

exceptions, and ensure that law-enforcement agents and judicial actors are educated about the principles involved,

10. Criminalise arbitrary, unauthorised and wilful violations of confidentiality of sources by third party actors,

11. Recognise that source protection laws can be strengthened by complementary whistleblower legislation.

I began the UNESCO study realising that it would be extremely challenging given the complexity of the issues, limited resources, global remit and major deadline pressure. But I did not fully appreciate, nor anticipate, at the outset how much the breadth, scope and difficulty of the research would expand, especially given that highly contentious Digital Age implications were rapidly evolving as the research unfolded. Secondly, at the time of commissioning, I was unaware of the extent of the fraught historical context which had plagued earlier UNESCO-commissioned research around freedom of expression issues¹⁷. When I began to address this increasingly complex set of issues, I realised that for this project to be effective, I had to operate at the intersection of international policy development, advocacy and journalism: in order to navigate and negotiate freedom of expression in public. It is this broader process which is described in this exegesis.

1.2 ‘Making content out of process’: associated outputs

As I describe in Chapter Six of this exegesis, the research process, writing and publication of the book were part of a broader practice that I call ‘making content out of process’ (Posetti 2013 pp88-100). This practice, applied to the *Protecting Journalism Sources in the Digital Age* project, involved a series of associated public events, staggered pre-publication outputs, affiliated journalistic publications, industry research publications, and social media engagement. These outputs are mapped and hyperlinked on the ‘impact timeline’ featured in appendix 9.1, and below is an ‘exemplar sample’ (Bull 2005) of these secondary outputs. They include:

1. My chapter on *The Urgent Need to Shield Journalism in the Age of Surveillance* for the World Editors Forum (WAN-IFRA) flagship global report ‘Trends in Newsrooms 2014’. I was Editor of this report (Posetti 2014c; 2014d)¹⁸

¹⁷ Note: See detailed discussion of the New World Information and Communication (NWICO) scandal in Chapter Four of this exegesis

¹⁸ Report also available here: http://www.wan-ifra.org/sites/default/files/field_media_image_file_attach/WAN-IFRA_Trends_Newsrooms_2014.pdf See also: this feature story based on the chapter published on the World Editors Forum’s blog: : <http://blog.wan-ifra.org/2014/06/24/trends-in-newsrooms-the-urgent-need-to-shield-journalism-in-the-age-of-surveillance> [Accessed: 16/8/18].

2. My chapter *Source Protection Erosion: The Rising Threat to Investigative Journalism* in 'Trends in Newsrooms 2015' (World Editors Forum/WAN-IFRA). I was also Editor of this edition of the report (Posetti 2015a; 2015b)¹⁹
3. My article for WAN-IFRA/World Editors Forum about the key 'takeaways' from the major extract taken from *Protecting Journalism Sources in the Digital Age* titled *13 Key recommendations and findings released from global source protection study* and published in UNESCO's *World Trends in Freedom of Expression and Media Development 2015: Special Digital Focus* (UNESCO 2015). This piece was designed to communicate these major research findings to the media industry and related stakeholders, and to continue building interest in the content, along with anticipation for the publication of the full book (Posetti 2015f).
4. My World Press Freedom Day 2016 Op Ed for *The Sydney Morning Herald* and *The Age*. Titled *Threats to Investigative Journalism Creep Close with Erosion of Source Protection*, this piece explicated the key findings and recommendations of the then still 'forthcoming' *Protecting Journalism Sources in the Digital Age* for an influential and broad audience (Posetti 2016)
5. My *Sydney Morning Herald* Op Ed for World Press Freedom Day 2017, coinciding with the launch of *Protecting Journalism Sources in the Digital Age*. Titled *It's getting harder to report the truth in a post-Trump world*, this piece allowed me to connect my research to emerging global political issues, thereby increasing its relevance and traction (Posetti 2017b)
6. My piece for the Global Investigative Journalism Network (GIJN) explaining the practical implications of the research for a core target audience: investigative reporters - *The Eroding State of Source Protection*²⁰
7. My story, coinciding with the book launch, targeting academic and specialist audiences for *The Conversation*. It was titled *Surveillance and data collection are putting journalists and sources at risk*²¹
8. A series of interactive events designed to engage broader publics, civil society groups and industry. These events are described in the appended 'Impact Timeline' but one is highlighted to demonstrate efficacy. This event is the preliminary launch of the study at the Frontline Club in London, hosted by the London Foreign Press Club. The video of this event, featuring prominent editors and lawyers, is available here: https://www.youtube.com/watch?time_continue=7&v=SroPCL-xsY8 [Accessed 18/8/18] (Churchill 2015)

¹⁹Report also available here: http://www.wan-ifra.org/sites/default/files/field_media_image_file_attach/WAN-IFRA_Trends_Newsrooms_2015.pdf [Accessed 31/8/18] And companion blog post is here: <https://blog.wan-ifra.org/2015/07/01/source-protection-erosion-a-global-case-study-on-the-rising-threat-to-investigative-journ>

²⁰ Also available here: <https://gijn.org/2017/05/29/the-eroding-state-of-source-protection/> [Accessed 30/8/18]

²¹ Also available here: <http://theconversation.com/unesco-report-surveillance-and-data-collection-are-putting-journalists-and-sources-at-risk-77038> [Accessed 31/8/18]

The objective of deploying journalistic methods and strategies to engage both specialist and general audiences in discussions and debates about *Protecting Journalism Sources in the Digital Age* was threefold:

- a) To use narrative devices and news frames to highlight the relevance and urgency of the research and its underlying issues
- b) To explicate and promote broader understanding of a difficult, contentious and complex set of interwoven issues central to contemporary debates at the intersection of privacy, technology, journalism and freedom of expression
- c) To enact the method of ‘making content out of process’ and to aid community building around the research with the purpose of keeping interest in the project alive during the long wait for publication-in-full.

While this kind of hybrid practice of public advocacy is becoming more common in the digital context, what is distinctive about the process in this instance is the associated negotiation of the UNESCO publication process. This process included an arduous verification procedure common to both journalism and academic research, however it was also accompanied by concerns over geopolitical sensitivities inherent in navigating diplomacy within intergovernmental organisations - this required even more rigorous standards of verification, along with ‘balance’. These tensions are unpacked in Chapter Six – a Critical Reflective Practice (CRP) account undertaken cooperatively²² with key actors connected to the project. My public performance of ‘making content out of process’ became an accountability mechanism to help ensure the publication of the report, but also its effective dissemination through constructing a ‘community of interest’ around the research in production, throughout its iterative publication phases.

1.3 This exegesis

This exegesis addresses the complex intersection of the issues outlined above, providing both critical reflection and scholarly context, it also situates *Protecting Journalism Sources in the Digital Age* within the project entire. Following on from an explication of the multiple methods deployed in undertaking the PhD research project as a whole (Chapter Two), the exegesis provides a comprehensive overview and analysis of relevant theories, scholarly literature and professional context.

²² Note: my deployment of the terms ‘cooperative deconstruction’, ‘collaborative deconstruction/reconstruction’, ‘interactive unpacking’ and ‘negotiated memory’ throughout this exegesis does not indicate a willingness on behalf of all interviewees to self-identify as contributors to these processes and/or outcomes. The interviewees do not have co-responsibility for my analysis and conclusions, nor do they necessarily agree with them.

Chapter Three covers the first grouping of theory and literature. Titled *Literature and context A: The surveillance state, journalism and the Digital Age*, this chapter offers scholarly context for the themes of the major artefact (i.e. the UNESCO-published book), with an analysis of academic literature along with high-level industry and civil society research. It includes references to academic publications that cite *Protecting Journalism Sources in the Digital Age*, and it interweaves scholarly and industry research with key elements from the main artefact to provide foundational academic support for the book's themes, findings and recommendations.

Chapter Four, *Literature and context B: UNESCO Freedom of expression research - a fraught history*, draws on a substantial body of scholarship detailing the historical and political context of freedom of expression research commissioned by UNESCO, dating back to the late 1970s. Particularly relevant are the impacts of the so-called New World Information and Communication Order (NWICO) scandal of 1980, which continue to resonate today. This incendiary public debate was fuelled by Western press freedom lobby groups outraged at misconstrued attempts by UNESCO to support redistribution of international media power and 'protect' journalists through a mechanism that was interpreted as a step towards 'licensing' or 'registering' journalists. These moves were perceived by opponents of the UNESCO MacBride Commission's NWICO research report as symptomatic of attempts to undermine core tenets of Western press freedom philosophies. Ultimately, in the context of this fight, both the US and UK quit UNESCO for extended periods, causing a financial crisis with 21st century echoes. This chapter (Chapter Four) provides geopolitical and historical context, along with scholarly underpinning for the 'critical reflective account' of logistical difficulties, geopolitical sensitivities, and tensions connected to the production and publication of *Protecting Journalism Sources in the Digital Age* which are presented in Chapter Six of the exegesis.

Chapter Five is titled *Literature and context C: Networked publics and hybrid journalism research*. It begins with an examination of notions of journalistic autonomy, objectivity and independence through an assessment of related professional practices and analysis of the theories driving them. This analysis is undertaken with the purpose of contextualising the profession's ritual rejection of 'belly-gazing' or 'inside the beltway' reportage i.e. journalism about the practice of, and threats to, journalism. This examination aids understanding of many journalists' reluctance to report on the impacts of mass surveillance and national security overreach on journalism practice, despite the broader freedom of expression implications. Based on an assessment of the literature, the chapter goes on to suggest, however, that there are many justifications for such coverage embedded within normative frameworks of journalism practice.

Purposefully, Chapter Five analyses a range of 'journalisms' categorised under the umbrella of 'advocacy journalism'. (Waisbord 2008) I present a taxonomy of 'journalisms' in this category that includes 'activist journalism', 'alternative journalism', 'development journalism', 'peace journalism', and 'interpretive

journalism'. The theories underpinning these practices are unpacked, and parallels with (and distinctions from) other forms of journalism practice at the fringes of the mainstream (such as 'public journalism') are drawn with reference to the literature. I also encourage a 'rebooting' of journalism values in this regard, recognising the implications of 'networked press freedom' (C.f. Annany 2018) and theories of media freedom that embrace the role and rights of audiences. (C.f. Reid 2017) Finally, I highlight the need to appreciate the networked nature of contemporary source protection – which could be termed 'networked source protection'. Additionally, Chapter Five supports the operation of this exegesis as an explication and examination of my approach to 'making content out of process'. (Posetti 2013 pp88-100) To this end, it interrogates academic research on 'networked journalism' (Beckett 2008), social journalism, and modes of social media-fuelled stakeholder engagement. In sum, the chapter theorises the process of developing and performing a hybrid model of publicly-engaged knowledge production and distribution for application to other such projects.

Chapter Six is my first-person account of the commissioning, research, production and publication processes involved with *Protecting Journalism Sources in the Digital Age*. It draws on a blend of theories and methods, including 'reflective practice' (Burns 2013 pp35-36; Fook et al 2009 pp287-292; Niblock 2007 pp20-32; Milan 2012 & Moon 1999), 'Critical Reflective Practice' (Lawrence 2011 pp256-268), thematic analysis, and autoethnography. It is informed by qualitative interviews with select expert research subjects who were directly or indirectly involved with the UNESCO study. This occurs through a process of what I call 'cooperative deconstruction' or 'collaborative critical reflection'²³. I am deploying these terms to describe a process involving a shared unpacking of the issues I analyse in connection with the project. This process involved three iterative interviews and ongoing email exchanges with the UNESCO Director who commissioned *Protecting Journalism Sources in the Digital Age* along with interviews with other key actors.²⁴ These interviews serve to inform and check my own Critical Reflective Practice. Chapter Six is also designed to elicit good practice recommendations for producing UNESCO-commissioned research on freedom of expression destined for the networked public sphere. Additionally, it serves to demonstrate the impediments, strictures, potential impacts and reach of the core artefact, along with the possibilities offered by an intersectional model for the public negotiation of freedom of expression, bringing together journalism, advocacy and public policy research. This chapter blends my personal insights, memories, feelings and experiences with those of colleagues involved with the project and/or the issues that underpin it. Highlighting the role of 'making content out of process', it reflects on the public performance of networked journalism and research as acts of advocacy designed

²³ Note: my deployment of the terms 'cooperative deconstruction', 'collaborative deconstruction/reconstruction', 'interactive unpacking' and 'negotiated memory' does not indicate a willingness on behalf of all interviewees to self-identify as contributors to these processes and/or outcomes. The interviewees do not have co-responsibility for my analysis and conclusions, nor do they necessarily agree with them.

²⁴ These interviewees are: UNESCO's Dr Guy Berger; former senior UNESCO Freedom of Expression project officer (Dr Courtney Radsch); the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (Prof. David Kaye); and one of the subjects of a case study featured in *Protecting Journalism Sources in the Digital Age* (prominent international investigative journalist James Risen).

to further freedom of expression rights at the international level.

1.4 Conclusion and summary

This introductory chapter to the exegetical thesis has outlined the objectives and purposes of each of the other chapters, providing a shorthand guide to the central problems, arguments, theories and methodologies underpinning the execution of *Protecting Journalism Sources in the Digital Age*. It has also highlighted the collaborative, participative and connective method at the heart of the broader PhD project, which includes the core artefact (the UNESCO-published study) and the range of associated outputs documented and analysed via this thesis.

The ultimate aim of this exegesis is to reflect on and aid the future navigation and negotiation of freedom of expression advocacy in public through high-impact research and convergent storytelling undertaken by journalists, intergovernmental organisations and civil society groups. The PhD project as a whole, serves as an intervention in support of protecting confidential sources - a journalistic practice recognised as a central tenet of journalism, one essential to the sustainability of investigative journalism, at time when the practice of accountability journalism globally is facing unprecedented Digital Age threats and myriad other converging pressures. It posits that the era of 'networked journalism' (Beckett 2008) and 'networked press freedom' (Annany 2018) requires an approach that could be understood as 'networked source protection'.

Chapter 2: Methodology

Through a combined approach of research-on-practice and research-through-practice, the methodology provides a unique insight into the production of a creative artefact. It builds new knowledge by constructing theory in an under-theorised area... Meanwhile, through the deconstruction of the production process, it reveals how journalism utilises familiar social science research methods in compiling, analysing and organising data... Taken together, the two approaches constitute a strong argument for [journalism] to be accepted as a legitimate research outcome. Exegesis and creative artefact are intimately intertwined: the written analysis contextualises and explores the contribution to knowledge.

(Lindgren and Philips 2011 p.81)

In this chapter, I will outline the mixed methodological approach adopted for this PhD project. For this purpose, I will aggregate and explain the methods used to support research and practice connected to the main artefact and its associated outputs. The methodologies applied to the construction of this exegesis will also be explicated.

2.1 Situating the major artefact: Protecting Journalism Sources in the Digital Age

A mixed methodological approach, combining quantitative ('datafication') and qualitative methods - Participatory Action Research (Reason & Bradbury 2008), Thematic Analysis (Guest 2012), semi-structured interviews (Rabionet 2011), Case Study (Mills et al 2010), and Constructivist Grounded Theory (Charmaz 2000) methodologies - was adopted for the UNESCO study.

2.1.1 Baseline data

The initial methodological plan for the UNESCO study involved treating a 2007 Privacy International report²⁵ (Banisar 2007) as baseline data for the research. But that report did not include a public data set. (Posetti 2017a p14)

A process of 'datafication' was therefore applied to the Banisar (2007) report in order to (Posetti 2017a p14):

- *Identify every country mentioned in the 2007 report*

²⁵ This eight-year-old report by David Banisar was titled *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources*

- *Establish which countries required additional research to strengthen the available data, thus enabling an updated benchmarking of the 2007 research*

This process of ‘datafication’ resulted in the identification of 124 countries for further study but the research brief limited the countries under examination to UNESCO Member States, reducing the final number of States for assessment to 121.

2.1.2 Environmental scan

Acting as both Chief Researcher and study author, having established the initial data, I assigned each country to a researcher or research assistant, according to language capacity, to enable commencement of an Environmental Scan (Posetti 2017a pp14-15) process – a qualitative mapping exercise. I commissioned four academic researchers²⁶ to assist on the project, eight Review Panel members (representing academia and civil society), and 11 research assistants²⁷. Between them, they spoke 11 languages. In cases where a researcher didn’t have the necessary language skills, the research was firstly conducted targeting English language sources. The process of undertaking the Environmental Scan involved: searching the legislative, legal and relevant NGO databases within countries; searching online news sites; contacting affiliates of news publishing organisations and NGOs/academics specialising in press freedom, freedom of expression, privacy, media law; contacting sources within specific countries. (Posetti 2017a pp14-15)

Through the Environmental Scan process, confidential source protection developments that had occurred in the legal, regulatory, and judicial environments dating from 2007 were identified within the countries under investigation. I then coded the documents produced, further narrowing the data corpus to a subset of countries where developments had occurred. Ultimately, changes (mostly with negative signifiers) occurred in 69% of countries examined. (Posetti 2017a p18) Finally, these countries were divided into the five UNESCO regional groups: Africa, Arab States, Asia and the Pacific, Europe and North America, Latin America and the Caribbean for the purpose of regional trends analysis.

2.1.3 Surveys and qualitative interviews

Next, I developed a set of online survey questions in consultation with academic members of a Review Panel that assisted the study through a process of ongoing peer review. This survey was launched in October 2014 and it continued until January 2015. (Posetti 2017a p15). It featured qualitative questions designed to engage members of the journalistic, academic, legal, freedom of expression and digital content communities internationally. Respondents were asked to: pinpoint shifts in the legal and

²⁶ Note: A/Prof Marcus O’Donnell was one of these researchers. He was then both a UOW colleague and my PhD co-supervisor

²⁷ Note: although these colleagues variously contributed to research underpinning the study, I was the project’s Chief Researcher and the book’s sole author. See book appendices for a full list of contributors.

regulatory environment pertaining to source protection since 2007; identify key experts for future qualitative interviews and; suggest potential case studies.

Additionally, the results from a survey launched during the World Editors Forum (WEF) in Turin (Italy) in June 2014 with UNESCO support (Posetti 2014b) were analysed and synthesised with the data from the main survey issued in connection with *Protecting Journalism Sources in the Digital Age*. The earlier survey was originally designed to feed a submission to UNESCO's over-arching Internet Study, and it targeted editors along with investigative journalists. The focus of this survey was the impact of the 'Snowden-Effect'²⁸ on newsrooms. The WEF survey data usefully expanded the corpus to enable assessment of the impacts of Digital Age source protection erosion on investigative journalism and editorial processes and practices. UNESCO also provided me with additional survey data gathered in connection with the over-arching Internet Study for examination. That survey asked: "To what extent do laws protect digitally interfaced journalism and journalistic sources?" (UNESCO 2014b) The combined data was then scanned for evidence of changes to legal source protection frameworks and digital elements which had not been identified in the Environmental Scan process.

As acknowledged in *Protecting Journalism Sources in the Digital Age*, the fact that these surveys were conducted online could have discouraged potential respondents due to concerns about communications surveillance and interception. But ultimately, 134 people from 35 countries responded to the combined surveys (Posetti 2017a p16) and that data was used to: inform the regional overviews (Posetti 2017a pp57-101) presented in the book; assist in the development of three thematic studies (Posetti 2017a 103-133); and pinpoint shifts in the global legal and regulatory source protection environment dating back to 2007.

2.1.4 Analysis and case studies

Dozens of actors with legal, journalism, and freedom of expression expertise were identified through these combined processes. Ultimately, with the goal of achieving regional and gender balance, 49 interviewees were selected from 22 countries on the basis of relevant expertise. (Posetti 2017a p16) To achieve a level of consistency, I developed nine key qualitative questions to be put to each expert actor during semi-structured interviews. Approximately 50 long-form interviews were then conducted by me and (under my guidance) the researchers and research assistants. These interviews were conducted via telephone, Skype, email and face-to-face, between November 2014 and March 2015. They were assigned in accordance with language capacity and recorded, transcribed, translated and coded before being analysed by me. They served the purpose of deepening the research and forming the foundation

²⁸ Note: the 'Snowden effect' refers to the impacts of NSA whistleblower Edward Snowden's 2013 revelations about US-orchestrated mass surveillance programs. These revelations continue to reverberate within newsrooms and among journalists internationally due to their implications for confidential communications with whistleblowers and sources. C.f. <https://blog.wan-iffra.org/2014/06/20/one-year-on-whats-the-impact-of-the-snowden-effect-on-your-newsroom>

of the thematic studies. This process was also informed by interview data that I had gathered for *Trends in Newsrooms 2014*, a major global report published by WAN-IFRA (Posetti 2014d), which included a chapter on international newsrooms' responses to the threat of mass surveillance revealed by the NSA whistleblower Edward Snowden.

Three thematic case studies were ultimately identified for in-depth analysis:

- *The impact of source protection erosion in the Digital Age on the practice of investigative journalism globally. (Posetti 2017a pp103-112)*
- *Sweden: How a State with one of the oldest and strongest legal source protection frameworks is responding and adapting to emerging digital threats. (Posetti 2017a pp112-120)*
- *Towards an international framework for assessing source protection dispensations in the Digital Age. (Posetti 2017a p120-133)*

2.2 'Making content out of process' through 'participative action research'

I also deployed 'Participative Action Research' (PAR) strategies in both gathering final pieces of data for the production of the main and in the process of building an audience for its publication. This set of experiential methods involves deriving understanding through a collaborative, reflective process designed to effect social change. As Reason and Bradbury (2008) have summarised, it:

- *Is a set of practices that responds to people's desire to act creatively in the face of practical and often pressing issues in their lives in organisations and communities;*
- *Calls for engagement with people in collaborative relationships, opening new 'communicative spaces' in which dialogue and development can flourish;*
- *Draws on many ways of knowing, both in the evidence that is generated in inquiry and its expression in diverse forms of presentation as we share learning with wider audiences;*
- *Is values oriented, seeking to address issues of significance concerning the flourishing of human persons, their communities, and the wider ecology in which we participate;*

- *Is a living, emergent process that cannot be predetermined but changes and develops as those engaged deepen their understanding of the issues to be addressed and develop their capacity as co-inquirers both individually and collectively (Reason & Bradbury 2008 pp3-4)*

My system of ‘making content out of process’ (Posetti 2013), as described in this exegesis, can be understood as an expression of Participative Action Research (PAR). It involves the creation of journalism and real-time social media content about the research process as it progresses, while simultaneously building communities of interest around that content, with a view to actively engaging research participation and amplification of a project’s objectives. In the case of *Protecting Journalism Sources in the Digital Age*, I used explanatory and activist reporting (see discussion in Chapter Five) approaches to engage key stakeholders in the research process (e.g. journalists, news organisations, civil society groups, academics, media lawyers) and encourage their participation in it. This involved targeted reporting for niche audiences (on and offline) and industry research outputs. I also engaged in public acts of ‘reflective practice’ (see discussion of this method later in this chapter) – describing my own experiences of working with confidential sources and the implications of source protection erosion for the kind of investigative journalism that I have practiced. My objective was to generate knowledge-sharing and awareness-raising alongside action connected to the research findings (as they emerged) in response to increasingly urgent threats to press freedom posed by mass surveillance and national security overreach.

This PAR-journalism approach was also designed to educate and activate broader publics through mainstream journalism about the wider societal implications of source protection erosion for the sustainability of open societies, and public events to discuss the preliminary research findings and additional insights as the research progressed.

In the interests of engaging key stakeholders around the forthcoming study, with a view to capturing up to date data, and to assist with distribution and amplification post publication (again, being mindful of the ‘creating content out of process’ method), I convened two panel discussions during the final phase of the UNESCO-commissioned research. The first panel, staged in Washington DC during the World News Congress/World Editors Forum in June 2015 (Posetti 2015d; Greenslade 2015), featured me and the following experts:

- Gerard Ryle (Executive Director, International Consortium of Investigative Journalists)
- Charles Tobin (US attorney specialising in source protection)
- Amy Mitchell (Director of Journalism Research, Pew Research Centre)
- Guy Berger (Director of Freedom of Expression and Media Development, UNESCO)

A second panel (July 2015) was initiated by the London Foreign Press Association and hosted by the Frontline Club. It was designed as an interactive pre-launch of the study's findings (Churchill 2015). The panellists (in addition to me) were:

- Jonathan Calvert (Editor, Insight, *The Sunday Times*)
- Gavin Millar QC (Barrister specialising in media law, including source protection)
- Jeremy Myers (BBC Internet Research Specialist)
- Paola Totaro (then President of the London Foreign Press Association)

The contributions of the panellists during both sessions were leveraged to update and strengthen the study's analysis during the final phase of research. This approach of using the networked public sphere to 'make content out of process' during the production of the major artefact was redeployed in the context of the eventual publication and release of the book (see discussion in Chapter Six of this exegesis, and the 'impact timeline' appended as 9.1). This involved a range of international public events and panel discussions featuring expert actors and engaged online communities in connection with these events, along with reportage from me about the project carried by both mainstream (e.g. *The Sydney Morning Herald*) and niche publications (e.g. Global Investigative Journalism Network). The aim was to make the research participants and networked publics agents for policy change (empowered by new knowledge) in response to Digital Era threats to confidential journalistic communications on which investigative reporting depends.

Data collection for the study at the core of this exegesis officially began on August 1st, 2014, and it ended on July 27th, 2015 when the finalised study was submitted to UNESCO. However, *Protecting Journalism Sources in the Digital Age* (Posetti 2017a) was not published in full until April 2017.

2.3 Research methods deployed in the production of this exegesis

A variety of models have been proposed for production-based PhDs and exegetical frameworks in journalism studies (Nash 2014; Phillips 2014; Lindgren & Phillips 2011), and this exegetical thesis can be situated within such frames. This exegesis responds to what Nash (2014) describes as: "the singularity and value of journalism as a research practice in its combination of a reflexive empirical focus, a focus on contemporary phenomena and an intense engagement with the politics of knowledge". (Nash 2014 p.76)

Nash proposes that a typical exegesis would include a literature review, an exposition of the methodology and an "evaluation of the success of the journalism component of the project in answering the research question". (Nash 2014 p.76) Phillips' (2014) action research-oriented model also

emphasises the documentation of process (Phillips 2014), while Lindgren and Philips (2011) point to the connective nature of exegesis and creative artefact:

Through a combined approach of research-on-practice and research-through-practice, the methodology provides a unique insight into the production of a creative artefact. It builds new knowledge by constructing theory in an under-theorised area... Meanwhile, through the deconstruction of the production process, it reveals how journalism utilises familiar social science research methods in compiling, analysing and organising data... Taken together, the two approaches constitute a strong argument for [journalism] to be accepted as a legitimate research outcome. Exegesis and creative artefact are intimately intertwined: the written analysis contextualises and explores the contribution to knowledge.
(Lindgren and Philips 2011 p.81)

2.3.1 A connective exegetical model

Drawing on these models from journalism studies, this exegesis follows an augmented ‘connective model’ (Hamilton & Jaaniste 2010 pp31-44) for practice-led research exegeses, as explicated by Hamilton and Jaaniste (2010):

This model combines earlier approaches to the exegesis, which oscillated between academic objectivity and personal reflexivity by providing a contextual framework for the practice, and commentary on the creative practice (Hamilton & Jaaniste 2010 p.31)

It identifies an emerging hybridised approach to exegesis construction, highlighting three core elements:

- Situating concepts (Definitions and Theories)
- Precedents of practice (Traditions and Exemplars)
- Researcher’s creative practice (the creative process, the artefacts produced and their value *as* research)

My approach to this exegesis responds to the three elements above as follows:

Situating concepts (Definitions and Theories): key terms and relevant theories underpinning both the major artefact and the exegesis will be explicated, analysed and synthesized. This is done in this chapter, along with the three literature and context chapters (Chapters 3-5)

Precedents of practice (Traditions and Exemplars): a range of comparable artefacts will be referenced, including major reports of the relevant UN Special Rapporteurs and other global UNESCO studies, along

with a corpus of parallel outputs produced by (or in association with) me. This is done throughout but particularly in Chapter Four, and in the appended 'impact timeline' (9.1)

Researcher's creative practice (the creative process, the artefacts produced and their value as research): I will reflect critically on my scholarship and professional practice connected to the execution, production, publication and distribution of *Protecting Journalism Sources in the Digital Age* as a research-journalism-intergovernmental policy hybrid. The undertaking of this project at the intersection of a global industry organisation with a press freedom remit (WAN-IFRA/World Editors Forum) and a UN body operating in the zone of 'realpolitik' (UNESCO) will be analysed with reference to competing forces, ethical and professional tensions, impediments and obstacle negotiation. As part of this process, I will present an annotated portfolio of associated outputs demonstrating an emerging intersectional model for 'networked press freedom' (Annany 2018) practice and performance. The key artefacts are presented as components of this thesis submission and the critical reflection is presented in Chapter 6)

Additionally, I will introduce two new elements to the 'connective exegesis model' which enhance the critical reflective process:

'Cooperative deconstruction' through qualitative semi-structured, longform interviews with key expert actors: six interviews with four key experts connected - either directly or indirectly - to the UNESCO project were undertaken specifically for the exegesis, as part of a collaborative reflective process that I am calling 'cooperative deconstruction'. The Thematic Analysis of these interviews provides a framework for comparing and contrasting my critical self-reflection against other actors' experiences. It will also allow for enrichment of the intersectional model of policy development, advocacy and journalism for negotiating freedom of expression in public explicated in this exegesis. I draw on these interviews throughout the critical reflection in Chapter Six.

Autoethnography: I will draw on principles from the traditions of 'analytic autoethnography' (Anderson 2006) and 'feminist autoethnography' (Ettore 2017a, Ettore 2017b) to support a cathartic rendering of my own lived experience of producing the work at the core of this exegesis, with reference to other key participants' experiences. The autoethnographic approach informs my critical reflection in Chapter Six.

My incorporation of both autoethnography and 'cooperative deconstruction' inform my approach to 'Critical Reflective Practice' (CRP) (Lawrence 2011 pp256-263) in assessing and analysing the processes, procedures, outputs and ethical dilemmas undertaken, produced, and experienced in the course of researching and producing *Protecting Journalism Sources in the Digital Age*.

2.3.2 Applying ‘cooperative deconstruction’ and autoethnography to Critical Reflective Practice

Variations of Critical Reflective Practice methods are used in the context of the study of social work (Fook 2007 pp263-275; Fook & Askeland 2009), nursing practice (Lawrence 2011 pp256-263) and Journalism Studies, particularly in reference to education/training, and development of professional ethics and standards (Niblock 2007; Burns 2013).

‘Critical reflection’ and ‘reflective practice’ are not interchangeable terms but they can interact and work in tandem. The concept of ‘reflection’ has its roots in Socrates’ idea of the ‘examined life’ designed to support engagement with the world in an ethical and compassionate manner (Nussbaum 1997). Donald Schon is considered a founder of ‘reflective practice’ (Schon 1993). Schon’s work addressed a perceived crisis in the professions which was indicated by a gap between theory and practice. His approach involved engaging professionals in reflection as a tool to unearth theory embedded in professional practice. However, Erlandson and Beach (2008) have identified a ‘double-sided ambivalence’ associated with Schon’s conceptualisation of ‘reflective practice’:

One concerns contradictory attitudes, expressions or feelings that are simultaneously directed toward an object, person or action, the other concerns undecidability and a fluctuation of meaning between a thing and its opposite. Both of them concern an aspect of uncertainty. (Erlandson & Beach 2008 p.409)

Reflective practice requires reflexivity, defined by Steier (1991) as a ‘turning back on itself’ and White (2002) as an ability to look both internally and externally. And ‘critical reflection’ can be described as a process focused on reflecting on power that is designed to excavate, analyse and transform deeply held assumptions, often with practice impacts and broader social change objectives (Agger 1998).²⁹ Applied to scholarship, this process can also involve increased awareness of the self as author and researcher, within a framework that encourages reflective practice as a device to help ‘locate’ the researcher (Ferrari 2010 p.217). The goal of ‘reflective practice’, according to Fook (2007), is to improve the accountability of professional practice via continual scrutiny of the principles on which it is based. “For this reason, the ability to reflect upon practice in an ongoing and systematic way is now regarded as essential to responsible professional practice.” (Fook 2007 p.441) In my case, the engagement of key informants in this Critical Reflective Process enhances this work of professional accountability.

Fook (2007) describes critical reflection applied to improve professional practice as:

²⁹ Note: critical social theory in the tradition of Marx and Habermas is also useful for understanding ‘critical reflection’

reflective practice that focuses on the power dimensions of assumptive thinking, and therefore on how practice might change in order to bring about change in the social situations in which professionals work. (Fook 2007 pp441-42)

Askeland and Fook (2009) identify three major types of cultural assumptions which are challenged by critical reflection: “These include assumptions regarding interpersonal communication and dialogue, professional helping and workplace cultures, and regarding knowledge, learning, research and the place of emotions.” (Fook & Askeland p.287)

In Journalism Studies, Niblock (2007 p.20) has defined ‘reflective practice’ and ‘reflexive research’ in the context of the rise of the ‘journalist-academic’ (a categorisation I identify with) and perspectives on journalism as ‘research-in-practice’. Sheridan-Burns (2013), meanwhile, describes reflective practice as the ‘bridge’ between journalism theory and professional practice. “It is through critical self-reflection that journalists develop self-reliance, confidence, problem-solving abilities, cooperation, and adaptability while simultaneously gaining knowledge.” (Sheridan-Burns 2013 p.36) She adds that critical reflection is also the process by which journalists learn to recognise their own assumptions and find their places in the broader social context. (Sheridan Burns 2013 pp35-36) This is true, too, of the collaborative research process I experienced in the production of *Protecting Journalism Sources in the Digital Age*.

In addition to applying Critical Reflective Practice to analysis of the production processes and construction of audiences (developed as communities of interest) around the published work, I have also applied the core principles to the undertaking of qualitative interviews for this exegesis. Borrowing from Ryan et al (2010 p.115), who describe the “messy process of reflection and action” involved in a collaborative writing exercise, I can identify the collaborative development of knowledge and shared awareness through a process of mutual critical reflection undertaken during long-form, semi-structured interviews with four key informants in the areas of journalism, UN diplomacy and civil society advocacy who participated in the research and production of *Protecting Journalism Sources in the Digital Age* in a variety of capacities. My interviewees are:

Dr Guy Berger, Director of Freedom of Expression and Media Development, UNESCO: Dr Berger commissioned *Protecting Journalism Sources in the Digital Age* for UNESCO and co-authored (with me) the research outline (attached to the commissioning documents) in my capacity as Research Fellow and Research Editor with the World Association of News Publishers (WAN-IFRA) and the World Editors Forum (WEF). He was the UNESCO manager responsible for the book’s publication and ultimately ensured its passage through multiple political approval processes at UNESCO. I have collaborated with Dr Berger on a range of journalism research, education and freedom of expression projects over the past

decade. For this exegesis, I conducted three (iterative) interviews with Dr Berger in 2017 and 2018 – two face-to-face and one via Skype.

Professor David Kaye, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Professor Kaye is an international expert on human rights law focused on freedom of expression and digital rights. He was engaged in my UNESCO research project from early 2015, reviewed the final draft, championed its publication and cited it prior to publication in his second thematic report to the UN General Assembly in 2015. He also invited me to participate in expert consultations on source protection and whistleblower rights designed to inform his own research for the UN, and I presented on my research findings (before my book was published) during a panel at UN headquarters in New York in 2015, on which he was also an expert speaker. I interviewed Professor Kaye via Skype in May 2018 for this exegesis.

Dr Courtney Radsch, Advocacy Director for the Committee to Protect Journalists (CPJ): Dr Radsch is currently with the press freedom and journalism safety NGO CPJ, but she was previously a senior expert working to Guy Berger at UNESCO in Paris, with responsibility for editing the first edition of the flagship UNESCO report *World Trends in Freedom of Expression and Media Development* in 2014 – a study which experienced many of the hurdles and challenges familiar to the production and publication of *Protecting Journalism Sources in the Digital Age* (see discussion in Chapter 6). She also acted as an expert source for my UNESCO study, following her departure from UNESCO in early 2014. Interviewed her for this exegesis in April 2018.

James Risen, National Security Editor at *The Intercept*: Risen was previously the long-serving National Security Editor and CIA Correspondent at *The New York Times*, where his commitment to source confidentiality and investigative journalism based on whistleblowers and sources acting in the public interest led him into conflict with the newspaper's management and landed him in court on pain of jail for refusing to divulge the identity of a source, in a legal case that embarrassed the Obama administration and ultimately resulted in the intervention of the US Attorney General. He has since joined *The Intercept*, the international online publication co-founded by the journalist-lawyer Glenn Greenwald who collaborated with Edward Snowden to reveal the overreach of the US' national security apparatus. I spoke to Mr Risen during research for *Protecting Sources in the Digital Age*, but he was unable to participate in the study during its production due to legal constraints and the impacts of the court case. However, he has since collaborated with me on a project designed to better equip journalists to work with whistleblowers (see discussion in Chapter Six). I interviewed him in April 2018.

The methodology for these interactive, long form interviews (which have been transcribed for analysis as described below) borrows from journalistic interview techniques (Altheide 2002 pp411-430; Sedorkin & McGregor 2002; Feldstein 2004 pp1-24) along with those deployed in field research undertaken by

historians and ethnographers, including autoethnographers (Brennan 2013 p.27; Smith 1989 pp316-30). Interactive interviews tend to be collaborative in nature, involving researcher and subject in fluid exchanges that conversationally probe issues and experiences, delivering "in-depth and intimate understanding of people's experiences with emotionally charged and sensitive topics" (Ellis et al 1997 p.119). They frequently involve multiple interview sessions and can be situated in the context of well-established or emerging relationships (Adams 2006 pp704-23). Relational ethics can be further complicated by continuation of interpersonal ties between autoethnographers and their collaborators/interview participants. In some instances, friends and professional collaborators are interviewed, in others, interviewees become friends during the course of the research process: "We do not normally regard them as impersonal 'subjects' only to be mined for data. Consequently, ethical issues affiliated with friendship become an important part of the research process and product." (Ellis et al 2011 p.30) These experiences³⁰, and associated ethical dilemmas, resonate with me given the long-standing relationships I have with two of the interviewees (Berger and Radsch), in particular.

'Relational concerns' are considered a fundamental aspect of research inquiry and on occasion autoethnographers feel obligated to show their work to participants (Ellis 2007 p.3) where it impacts on them, in order to give them an opportunity to respond and re-frame their contributions in the context of the collaborative exercise of sense-making of experience. Such conduct would generally be considered antithetical to professional journalistic practice, but it intersects with the desire expressed by James Risen (one of my exegesis interview subjects) that confidential sources and whistleblowers working with journalists be treated as 'friends'³¹. It is also a technique adopted by researchers when identifying research participants in connection with their contribution, where it is considered ethically appropriate to do so. While autoethnographers recognise the need to be mindful of potential impacts on research integrity, "Most of the time, they also have to be able to continue to live in the world of relationships in which their research is embedded after the research is completed." (Ellis et al 2011 p.31) Interestingly, autoethnographers also have to contend with one of the common dilemmas experienced by news reporters: the inconsistency of witness accounts. "We know that memory is fallible, that it is impossible to recall or report on events in language that exactly represents how those events were lived and felt; and we recognize that people who have experienced the 'same' event often tell different stories about what happened." (Ellis et. al. 2011 p.31)

Finally, it's worth recognising the disconnect between investigative journalism practice and autoethnographic storytelling involving interview subjects. As Wahl-Jorgensen (2013) observes: "Journalists rely on the outsourcing of emotional labor to non-journalists – the story protagonists and

³⁰ See also Tillmann-Healy (2003) Op. Cit.; Kiegelmann, Mechthild (2010). Ethik. In Günter Mey & Katja Mruck (Eds.), *Handbuch Qualitative Forschung in der Psychologie* (pp382-394). Wiesbaden: VS Verlag/Springer; Tillmann, Lisa M. (2009). Body and bulimia revisited: Reflections on "A Secret Life." *Journal of Applied Communication Research*, 37(1), pp98-112.

³¹ Research interview with James Risen recorded in Italy in April, 2018

other sources, who are (a) authorized to express emotions in public, and (b) whose emotions journalists can authoritatively describe without implicating themselves.” (Wahl-Jorgensen 2013 p.129) This is essentially what I have done, recalling my experience as an investigative reporter keen to outsource my lived experience to expert sources, rather than rely entirely on my own critical reflections. This experience is familiar to Lindgren (2017 p.183), who has written about the challenges of operating in the mode of ‘journalist-as autoethnographer’, including the discomfort of “putting oneself in the frame” which can lead to the outsourcing of memory processing. Particular challenges of this enterprise – as I encountered in the production of the ‘reflective practice account’ featured in this exegesis (Chapter Six) – include overcoming the objectivity norm and other news reporting conventions that encourage the journalist to distance herself from her own story.

2.3.3 Adding analytic autoethnographic methods

Autoethnography combines characteristics of autobiography and ethnography. That is to say, it combines retroactive and selective written reflections on past experiences with study of a culture’s shared experiences, values and beliefs, along with relational practices, in order to advance cultural understanding. (Ellis et al 2011) Autoethnographers seek to make cultural characteristics familiar to ‘outsiders’ as well as ‘insiders’ by detailing aspects of cultural experience through personalised illustration: “To accomplish this might require comparing and contrasting personal experience against existing research, interviewing cultural members, and/or examining relevant cultural artefacts.” (Ellis et al 2011 p.345) For more detailed discussion of the process of comparing personal experience with research, see Ronai (1995 pp 395-426 & 1996 pp 109-31) For explorations of the role of interviewing others in the context of autoethnography see Foster (2006), Marvasti (2006 p525-547), and Tillmann-Healy (2003 pp 729-749). Finally, Boylorn (2008 pp 413-433) and Denzin (2006 pp 391-395) deal with the examination of cultural ‘artefacts’.

Autoethnographies produced by researchers invoke “thick descriptions of personal and interpersonal experience” (Ellis et al 2011 p.14) based on assessment and analysis of patterns of cultural experience derived from interviews (which I have deployed), field notes and other artefacts (which, in my case, include emails, margin notes in early draft copies of the main artefact, text/app messages and social media messages), and using descriptive narration along with a recognisable authorial voice to weave the observations together (as I do in this exegesis). The autoethnographic researcher’s objectives include making personal and cultural experiences engaging and meaningful but they also focus on reaching broader and more diverse audiences than achieved by comparatively inaccessible traditional research outputs. (Ellis et al 2011 p.14)

My approach to autoethnography in this exegesis follows ‘analytic autoethnography’ as outlined by Anderson (2006 p.373-395). He presents a framework for this method which includes: analytic reflexivity; narrative visibility of the researcher’s self; dialogue with informants beyond the self;

commitment to theoretical analysis (Anderson 2006 p.373). It is a methodological mode well-suited to my project, which has at its core a book that is categorised as a hybrid research-journalism-intergovernmental policy text and involves a process of critical reflection informed by other key actors through interviews. According to Pace (2012), it involves the application of Grounded Theory analytic strategies to the process of critical reflection. He describes the model as particularly valuable to “researchers who want to practise autoethnography within a realist or analytic tradition of professional practice.” (Pace 2012 p.1)

There are noted distinctions between Grounded Theory (Charmaz 2000 pp 509-35) and what are frequently termed ‘layered accounts’ in autoethnography. These situate the author’s experience within the corpus of data, the relevant academic literature and abstract analysis. The simultaneous procession of data collection and analysis overlap with GT (Charmaz 1983 p.109), but layered accounts differ in that they use ‘vignettes, reflexivity, multiple voices, and introspection’ (Ellis 1991 p.23) to invite readers to ‘participate’ in the process of producing. (Ronai 1992 p.102)

These theories and methods of autoethnography (with an emphasis on ‘analytic autoethnography’) and ‘reflective practice’ (with an emphasis on Critical Reflective Practice) are applied to the production of this exegesis, especially regarding the deconstruction and reconstruction of the story of the creation, publication, distribution and impact of the major artefact. This will occur with reference to the interviews with key actors, my personal reflections, shared recollections, contemporaneous notes, emails, conversations on messenger apps, and comments on draft reports. Additionally, it will be complemented by the curation of an annotated collection of research publications, journalism outputs, events, and core social media activities connected to the UNESCO study, featured on an ‘Impact Timeline’ appended to the exegesis (See Appendix 1).

2.4 Conclusion and summary

In this chapter I have outlined the methodological frameworks underpinning the production of:

1. *Protecting Journalism Sources in the Digital Age*, the major artefact at the heart of this PhD project
2. The range of associated and participative processes that fed the development, production and promotion of this book
3. The Critical Reflective Practice account produced in this exegesis

The major artefact was produced through a series of overlapping, rigorous research methods common to both journalism and academic policy research (and intensified in the context of UN geopolitics) but these traditional methods were enhanced by connective and participatory strategies which sought to ‘make content out of process’ and simultaneously create an audience to enhance its impact. This connective process also underpins the methodology of this exegesis in both situating the work of the

project in a broader scholarly context and through its unique approach to 'cooperative deconstruction' employed as part of the critical reflective process.

Chapter 3: Literature and Context A - The Surveillance State

Journalism, privacy and the Digital Age

There is widespread recognition in international agreements, case law and declarations that protection of journalists' sources (are) a crucial aspect of freedom of expression that should be protected by all nations. (Banisar 2007)

...journalistic communications are increasingly being caught up in the surveillance nets of law enforcement and national security agencies as they trawl for evidence of criminal activity, terrorism and national security threats, and conduct leak investigations. (Posetti 2017a p.12)

...world events and the advances of technology pose significant challenges just as the privilege is becoming established firmly in international human rights law. A major UNESCO report in 2017 warned that anti-terrorism and national security legislation, government surveillance, and data retention and disclosure requirements all could undermine journalistic privilege. (Carter 2017)

3.1 Literature and context overview

This chapter is the first of three thematic chapters, which serve as a scholarly anchor for convergent themes underpinning both the major artefact (with its associated outputs³²) and this exegesis. These chapters provide a series of contextual, comparative literature reviews that explore a range of theories and academic research, along with high level professional publications (including research and reports from intergovernmental organisations, civil society and industry), across the fields of journalism studies, activism and advocacy, digital communications, human rights law, and the history of UNESCO as a publisher of research on freedom of expression issues connected to the practice of journalism. This literature review is designed to explicate the intersectional model underpinning the production, publication and impact of *Protecting Journalism Sources in the Digital Age* (Posetti 2017a). The purpose is to provide intersectional perspectives on the navigation and negotiation of freedom of expression in the networked public sphere via UNESCO-commissioned research on the global state of journalistic source protection in the post-Snowden era. The scholarly and industry research assessed in this section is augmented with an 'impact timeline' (Appendix 9.1) which situates *Protecting Journalism Sources in the Digital Age* within the recent history (starting in 2013) of UN declarations, resolutions, reports, statements, comments and actions relevant to the themes. Additionally, it plots major related

³² See appendix 9.1

developments initiated by regional intergovernmental bodies and relevant international jurisprudence alongside the major outputs from the *Protecting Journalism Sources* project. The purpose of the timeline is to demonstrate the evolution, trajectory and impact of the book, again highlighting the intersectional production and dissemination model of this PhD project across academic research, policy development, journalism and civil society advocacy.

Protecting Journalism Sources in the Digital Age, finally published in full by UNESCO in April 2017, is the main artefact at the core of this PhD project. But the nature of the study – which can be categorised as a hybrid publication sitting at the intersection of public policy reports, journalism, and academic research – precluded inclusion of a comprehensive literature review. As a result, the three-part literature review and context section of this exegesis commences with *Literature and Context A: The Surveillance State - Journalism, Privacy and the Digital Age* (Chapter Three). This chapter assesses scholarly research connected to the protection of journalists' confidential sources and whistleblowers in the context of digital disruption. This is achieved through an interweaving of scholarly literature, research and policy documents with the key findings and pertinent excerpts from my UNESCO study on the theme.

In the next chapter (Chapter 4), *Literature and Context B: UNESCO freedom of expression research publications - a fraught history*, I address the contentious history of UNESCO research and publications in the freedom of expression arena connected to the practice and defence of journalism. The role of UNESCO in commissioning such research, raising awareness and pressing for change on issues relevant to source protection is emphasised. This enables contextualised analysis of the intended purpose and impact of the major artefact, along with my critical reflections on the issues, strictures, obstacles and tensions connected to the 'realpolitik' (Brew 2015) involved in producing a contentious global study for an intergovernmental organisation like UNESCO.³³

Finally, in *Literature & Context C: Applying the principles of advocacy journalism to freedom of expression research in a 'networked press freedom' era* (Chapter Five) alternative theories supporting production of public interest journalism and research in the social media era are explored in the context of communicating the freedom of expression risks associated with source protection erosion. Here, the emphasis is on the intersecting themes of advocacy and activist journalism, social journalism, digital communications; digital citizenship, and 'networked press freedom'.

Taken together, the analysis of scholarly literature and reports reviewed in these chapters is designed to explicate the hybrid model underpinning the production, publication and impact of *Protecting Journalism Sources in the Digital Age* (Posetti 2017a).

³³ See Chapter Six for a detailed deconstruction

3.2 Protecting journalism sources: intent and purpose

In both journalism and legal studies, and in international policy instruments, there is a broad and longstanding agreement on the need to protect the confidentiality of journalism sources. As Banisar (2007) has noted:

There is widespread recognition in international agreements, case law and declarations that protection of journalists' sources (are) a crucial aspect of freedom of expression that should be protected by all nations.

The need to ensure a free flow of information, especially in regard to information derived from whistleblowers, is the general justification for protecting confidential communications between journalism practitioners and their sources. Martin (1983) describes whistleblowing as disclosure by an employee of their employer's improper activities, and whistleblowers as "...merely ordinary employees who feel so troubled by their employer's conduct that they feel compelled to take action". While whistleblowing covers issues broader than employers' conduct, the absence of protections can cause a 'chilling effect' making those with sensitive information valuable to the public interest being more reluctant to come forward. Another flow-on effect involves those doing journalism becoming more cautious about seeking and using information supplied on condition of confidentiality, "because of knowledge or suspicion that they will be put under pressure to reveal sources, with resultant concomitant shrinkage of public interest content." (Posetti 2017a p.12)

In the absence of confidential sources, many acts of investigative storytelling - from Watergate (St Dizier 1985) to the major 2016 investigative journalism project 'the Panama Papers' led by the International Consortium of Investigative Journalists (ICIJ)³⁴ - might never have surfaced. Such sources often require anonymity to protect them from physical, economic or professional reprisals following the public exposure of their revelations. In the case of the Panama Papers, the confidential source who delivered the biggest data dump in the history of journalism demanded anonymity and would only agree to communicate via heavily encrypted methods (MacGregor, Watkins et al 2017 pp505-552).

Internationally, journalists are guided by an established ethical obligation to protect their confidential sources from unmasking - this commitment is essential to public trust in professional journalism. In parallel, and in recognition of the vital function that confidential sources play in facilitating 'watchdog journalism' (Waisbord 2000, Schultz 1998) or 'accountability journalism' (Downie & Schudson 2009), there is also a strong tradition of legal and normative source protection frameworks internationally. These laws are often referred to as the journalists' 'privilege' (Nestler 2005) or 'shield laws' (Fargo 2006) because they are designed to shield the journalist from being forced to reveal a source's identity (an act

³⁴ See <https://www.icij.org/investigations/panama-papers/> [Accessed 20/7/18]

that in turn shields the source). “Such protection is viewed as necessary to ensure the free flow of information - an essential element of several international human rights agreements.” (Posetti 2017a p.30) In some countries, it is actually a legal requirement that journalists protect their sources. In Sweden, for example, journalists can be *prosecuted* for revealing the identities of their sources (Hendler 2010; Posetti 2017a pp112-19³⁵). However, in many countries, journalists can still be compelled to identify their sources through legal processes – sometimes on pain of penalties, prosecution and imprisonment.

There are limited exceptions to legal source protection, such as when a journalist is accused of committing a crime, if s/he witnesses a serious crime, or circumstances involving immediate and grave threats to human life. For a discussion of the need to limit the journalist’s privilege in exceptional circumstances, see Carney (2009). The international instruments concur that the protection of sources is “indispensable” and a “basic condition for press freedom”, as Banisar (2007) has noted: “Without it, the media will not be able to effectively gather information, and provide the public with information, and act as an effective watchdog” (Banisar 2007 p.13). The presumption made is that “exceptional circumstances” are required to justify disclosure of journalists’ confidential sources. Accordingly, the need for information about the source must be judged as essential, and only in cases where there is a ‘vital interest’ can disclosure be justified (Carney 2009). As I concluded in *Protecting Journalism Sources in the Digital Age*, “Where the legal line is drawn, and how it is interpreted, varies around the world but the principle that sets confidentiality as the norm, and disclosure as the exception, is the generally accepted standard.” (Posetti 2017a p.11)

While international practices vary significantly, Europe is considered to be at the forefront of legal source protection defence and maintenance. There, direct demands to expose sources tend to be exceptions rather than the norm, with recognition of the right to source protection fairly well established in many countries. However, many of these laws are limited in scope, or in their application (e.g. restricting access to certain categories of journalism practitioners). In 2011 the Council of Europe Parliamentary Assembly adopted Recommendation 1950 on the protection of journalists’ sources. This Recommendation reaffirmed the centrality of source protection to democratic journalistic function. Specifically, this Recommendation noted broad exceptions to source protection in Hungary and called on the government to amend the law which it described as being:

...overly broad and thus may have a severe chilling effect on media freedom. This law sets forth neither the procedural conditions concerning disclosures, nor guarantees for journalists requested to disclose their source. (COE 2011)

³⁵ Thematic study of the state of legal source protection in Sweden in the Digital Age

Regional intergovernmental organisations such as the African Union (AU), Council of Europe (CoE), the Organization for Security and Co-operation in Europe (OSCE), and the Organisation of American States (OAS) have all specifically recognised journalistic source protection rights. The European Court of Human Rights (ECtHR) has also found that this right is an essential component of freedom of expression in several judgements. (Posetti 2017a pp41-56)³⁶

3.2.1 Protecting journalism sources: Digital Era implications

However, this principle of journalistic source protection works in practice only if the identity of the confidential source is not able to be easily discovered by other means, and if there are limits on the use of any identifying information if it is revealed. The Digital Age risks to the security of these legal and normative source protection frameworks were highlighted by Edward Snowden's extraordinary revelations in 2013 – which he initially divulged to journalists as a confidential source - about mass surveillance undertaken by the US National Security Agency (NSA). In an age when most journalism is researched and produced in a digital environment, the threats highlighted by these leaks are very significant. The surveillance nets scoop up journalistic communications and the 'shield' of source protection is penetrated further as a result of mandatory data retention policies and the role of third-party intermediaries such as social media companies (see detailed discussion later in this section).

As a result of these Digital Age developments, there are also new questions now facing courts, legislators, media lawyers and journalists. In the analogue era, the standard questions regarding confidential source protection were (Posetti 2017a p.13):

- 1) Can a journalist be forced to reveal the confidential source of published information by a court?*
- 2) Can journalists and news organisations be the subject of targeted surveillance and search and seizure operations?*

But now, there are additional key questions:

- 1) Do the processes of automatically intercepting and collecting communications through mass surveillance and mandatory data retention which enable subsequent analysis via technologically advanced tools (e.g. programmes that give intelligence agencies access to third party intermediary data stores) constitute a breach of recognition of a right to withhold the identity of sources?*

³⁶ See, in particular, references to the 2017 ECtHR judgement in a source protection case (which cites *Protecting Journalism Sources in the Digital Age*) in Chapter Six and Appendix 9.1 (Impact Timeline)

2) Can the effects of such potential interference be minimised or limited through introducing or updating legal source protection frameworks that engage with these challenges?

And, as Banisar (2007) noted, even a decade ago the trend towards national security overreach and mass surveillance had begun to surface:

The protections are being bypassed in many countries by the use of searches of newsrooms and through increasing use of surveillance. There has also been an increase in the use of criminal sanctions against journalists, especially under national security grounds for receiving information from sources. (Banisar 2007 p71)

More recently, European organisations and law-making bodies have made significant attempts at a regional level to identify the risks posed to source protection in the changing digital environment, and to mitigate these risks. For example, a 2010 report from the Council of Europe stated that: “The confidentiality of journalists’ sources must not be compromised by the increasing technological possibilities for public authorities to control the use by journalists of mobile telecommunication and Internet media.” (COE 2010)

In a report on online freedom of expression, assembly, association and the media for a Council of Europe Conference of Ministers on Freedom of Expression and Democracy in the Digital Age, Brown (2013) drew attention to the increasing risks posed by metadata retention and handover: “If this government surveillance of a substantial part of all internet communications (and collection of ‘metadata’ about them) continues, it will be much more difficult for journalists to protect their sources, particularly those revealing controversial or potentially illegal government activities.”

Recent academic research (2017) by Hintz and Brown has assessed the impacts of these policy debates in the UK. There, they conclude that while there has been limited review of problematic policies highlighted by the Snowden revelations, reform is impeded by a growing range of surveillance capabilities (Hintz & Brown 2017 pp782-801). As I concluded in *Protecting Journalism Sources in the Digital Age*, source protection laws are increasingly at risk of erosion, restriction and compromise around the world, a development that represents a direct challenge to the complementary universal rights to freedom of expression and privacy covered by Articles 12 and 19 of the UN Declaration on Human Rights (UN GA 1948), and Article 19 of the International Covenant on Civil and Political Rights (UN GA 1966).

Writing about positive developments in international jurisprudence supporting the protection of source confidentiality, Carter (2017) cited the just published *Protecting Journalism Sources in the Digital Age* as evidence of new threats highlighted by the Snowden revelations:

...world events and the advances of technology pose significant challenges just as the privilege is becoming established firmly in international human rights law. A major UNESCO report in 2017 warned that anti-terrorism and national security legislation, government surveillance, and data retention and disclosure requirements all could undermine journalistic privilege. (Carter 2017)

Carter (2017) has called for future research pertaining to freedom of expression to focus on international law and contemporary challenges involving technology, surveillance, and shifting understandings of democratic citizenship. This is precisely what *Protecting Sources in the Digital Age* did in the context of examining the status of international legal frameworks supporting source protection, as regards the role and practice of investigative journalism dependent upon confidential communications with sources and whistleblowers. The Digital Age implications are therefore the main focus of this section of the literature review.

Under the rubric of privacy erosion and national security overreach impacts identified globally through the research process, *Protecting Journalism Sources in the Digital Age* highlighted four key inter-related themes for understanding the evolving international regulatory environment and the regional analyses contained within the book. These were (Posetti 2017a p.18):

- *The widespread use of mass and targeted surveillance of journalists and their sources undercuts legal source protection frameworks by intercepting journalistic communications*
- *The risk of source protection laws being trumped by national security and anti-terrorism legislation that increasingly broadens definitions of ‘classified information’ and limits exceptions for journalistic acts*
- *Expanding requirements for third party intermediaries to mandatorily retain citizens’ data for increasingly lengthy periods of time further exposes journalistic communications with confidential sources*
- *Debates about digital media actors’ entitlement to access source protection laws where they exist, are intensifying internationally³⁷*

These themes informed the international and regional catalogues of developments affecting legal source protection frameworks – including legislative changes, judicial precedents, incidents and revelations – along with the case studies documented in the book (Posetti 2017a pp103-133). They are re-examined below, for the purpose of this exegesis, as subjects for analysis anchored in (and interwoven with) the academic literature.

³⁷ As demonstrated by the case study featured in Posetti J (2017a) ‘*The impact of source protection erosion in the Digital Age on the practice of investigative journalism globally*’ (pp 103-112) this theme also extends to debate about impacts on journalism practice, newsroom responses, and ethics.

3.3 The role of mass surveillance and targeted surveillance in eroding privacy and undercutting legal protections

Podkowiak (2014) argues that technological developments and a change in operational policing and intelligence service methods are redefining the legal classification of privacy and journalistic privilege globally. Additionally, law enforcement and national security agencies have shifted from a process of detecting crimes already committed, to one of threat prevention in the post-September 11 environment, aided by rapid technological advancement. The simple act of using certain modes of communication – like mobile technology, email and social networks - may result in a person being subject to surveillance in the Digital Age. That is to say, commission of a crime, or suspicion of committing a crime are no longer essential prerequisites. (Podkowiak 2014; Banisar 2008) As a result, “journalistic communications are increasingly being caught up in the surveillance nets of law enforcement and national security agencies as they trawl for evidence of criminal activity, terrorism and national security threats, and conduct leak investigations.” (Posetti 2017a p.12) This is a phenomenon that has particular currency in the US, where Gardner (2016) argues that the intelligence community has become: “the unacknowledged supreme master of the federal government”. (Gardner 2016 p.320) By threatening aggressive investigative journalism and shielding government malpractice, he argues that US intelligence agencies have ultimately done more to undermine US democracy than to make citizens safe.

The now dominant social platforms are also complicit in these developments. “You have zero privacy anyway...Get over it” (Sprenger 1999) Sun Microsystems CEO Scott McNeally famously said in a 1999 interview. A decade later, Google’s Eric Schmidt added: “If you have something that you don't want anyone to know, maybe you shouldn't be doing it in the first place.” (Esguerra 2009) However, privacy is “commonly recognised as a core right that underpins human dignity and such other values as freedom of association and freedom of speech”. (Banisar 2011) The evidence of mass privacy erosion in the ‘Surveillance State,’ revealed when Edward Snowden blew the whistle on the NSA in collaboration with *The Guardian* and *The Washington Post*, triggered United Nations’ responses (see discussion below) that ultimately led to the commissioning of *Protecting Journalism Sources in the Digital Age*. “They know where you got on the bus, where you went to work, where you slept, and what other cell phones slept with you,” (Snowden 2016) Snowden explained while illustrating the global impacts of mass surveillance. (*The Guardian* 2014)

3.3.1 What is surveillance?

Lyon (2009) defined surveillance as “the focused, systematic and routine attention to personal details for purposes of influence, management, protection or direction”. (Lyon 2009 p.24) A range of scholars (Andrejevic 2007 & 2014 pp2619-2630; Morozov 2013; Fuchs 2011; Eubanks 2014; Giroux 2015 pp108-

40) have warned that surveillance is a broader problem than the impingement of individual privacy, one which was too slow to surface in journalistic treatment as well as scholarly research. As Paliwala (2013) has written of the manipulation of the internet for surveillance purposes: "...cyber-utopians did not predict how useful it would prove for propaganda purposes, how masterfully dictators would learn to use it for surveillance". (Paliwala 2013 p.104) Andrejevic (2014) has argued that mass surveillance represents a fundamental alteration to the power dynamics of society:

...Surveillance should be understood as referring to forms of monitoring deeply embedded in structural conditions of asymmetrical power relations that underwrite domination and exploitation. (Andrejevic 2014 p2625)

Mass surveillance can be defined as the broad, arbitrary monitoring of an entire or substantial fraction of a population³⁸.

A major report by the Council of Europe (2016) *Mass Surveillance: Who is Watching the Watchers?* referenced Snowden's disclosures as "compelling evidence of the existence of far-reaching, technologically advanced surveillance systems" (COE 2016). The report described the evolution of a massive 'surveillance-industrial complex':

...which risks escaping democratic control and accountability and threatens the free and open character of our societies. The surveillance practices disclosed [by Snowden] endanger fundamental human rights, including the rights to privacy, freedom of information and expression, and the rights to a fair trial and freedom of religion. (COE 2016 p1)

Brooke (2016), has observed that "In the societies of control, all are reduced to data" (Brooke 2016 p.65) while Quill (2014) contends that modern States have an insatiable appetite for data about their citizens – frequently motivated by a desire to control populations, pre-empt threats, and counter challenges to power and authority. The 'internet of things' (Weber & Weber 2010) – which involves the augmentation of household devices public utilities and healthcare systems etc with smart technologies – has extended the digital surveillance network previously served by CCTV cameras and satellite-based global positioning systems (GPS). Additionally, the ubiquitous practice of social media sharing means that "Facebook has a richer, more intimate hoard of information about its citizens than any nation has ever had." (Grossman 2010) Combined with Snowden's revelations of mass surveillance, and the 'internet of things', the self-exposure that happens as a result of en-masse social media use (Lyon 2017 pp824-842), has contributed to what Heikkila and Kunelius (2017 pp 262-76) have described as the 'structural transformation of privacy'. Which explains Steinberg's contention that:

³⁸ See: Electronic Frontier Foundation (EFF), n.d., 'Mass Surveillance Technologies,' Electronic Frontier Foundation: <https://www.eff.org/issues/mass-surveillance-technologies> [Accessed 23/7/18]

...few people are less happy these days than privacy campaigners. The fact that everyone carries sensor laden mobile phones makes national security agencies more powerful than they were before. Even where privacy protecting technologies exist, they cannot be said to be equal and opposite in effect to the ubiquitous computing we now live amongst. Mobile computing is a permanently power shifting technology that permanently empowers the security services. (Steinberg 2015)

The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, wrote in a 2014 report that States can obtain access to the email and phone content of an effectively unlimited number of users and access a continuous overview of particular websites' activity:

All of this is possible without any prior suspicion related to a specific individual or organisation. The communications of literally every Internet user are potentially open for inspection by intelligence and law enforcement agencies in the States concerned. (UN GA 2014)

Emmerson's report also expressed concern about the extent of targeted surveillance: "Targeted surveillance...enables intelligence and law enforcement agencies to monitor the online activity of particular individuals, to penetrate databases and cloud facilities, and to capture the information stored on them." (UN GA 2014)

The University of Toronto's Monk School of Global Affairs' Citizen Lab has discovered command and control servers for FinFisher software (also known as FinSpy) backdoors, in a total of 25 countries, including 14 countries in Asia, nine in Europe and North America, one in Latin America and the Caribbean, and one in Africa. (Marquis-Boire et al 2013) This software is exclusively sold to governments and law enforcement agencies. (Blue 2014) As Rogers and Eden (2017) have observed, the Snowden documents:

...revealed that intelligence agencies conduct large-scale digital surveillance by exploiting vulnerabilities in the hardware and software of communication infrastructures. These vulnerabilities have been characterized as 'weaknesses', 'flaws', 'bugs', and 'backdoors'". (Rogers & Eden 2017 p.802)

3.3.2 Mass surveillance: the implications for journalists

This has particular implications for journalists, especially those whose reporting depends on secure

communications with confidential sources³⁹. More recent work of mine for UNESCO also points to new risks involving the digital targeting of journalists and their sources by malicious actors (including States and corporations) in the context of online disinformation campaigns. (Posetti 2017d; 2018b)

Additionally, the lack of transparency (and contestability) connected to surveillance practices that target journalists or catch them in the net also heightens the risk.⁴⁰ According to Belgian Media Law expert, Professor Dirk Voorhoof: “When it comes to monitoring online communications, the practices that are breaching the rights (associated with) protection of journalists’ sources almost become invisible, and these practices are often to be situated in the nearly invisible actions of security and intelligence services.” (Posetti 2017a p.23) He described this lack of transparency, and associated lack of enforcement of source protection laws in the digital environment, as a problem for democracy.

Privacy International’s Tomaso Falchetta described the particular risks mass surveillance poses to journalism for the UNESCO study: “Mass digital surveillance is inherently untargeted, thereby collecting all types of information, often greater than those obtained by other legal means. The surveillance is likely to result in the interception of information about other sources, research on pending stories, and the personal life of the journalist.” (Posetti 2017a p22) The knock-on effects for sources and journalists of such exposure are detailed in a chapter on the digital targeting of journalists and their sources in UNESCO’s handbook⁴¹ on *Journalism, ‘Fake News’ and Disinformation*. (Posetti 2018b)

The practice of ‘outsourcing’ the interception of citizens’ communications to allied Five Eyes (Teague et al 2017) countries’ national security agencies (e.g. US, UK, Canada, Australia and New Zealand), in order to avoid domestic privacy and freedom of expression laws, may heighten the risks for journalistic source protection:

The Five Eyes alliance – comprised of the United States National Security Agency (NSA), the United Kingdom’s Government Communications Headquarters (GCHQ), Canada’s Communications Security Establishment Canada (CSEC), the Australian Signals Directorate (ASD), and New Zealand’s Government Communications Security Bureau (GCSB) – is the continuation of an intelligence partnership formed in the aftermath of the Second World War. (Nyst & Crowe 2014)

Couldry (2017 pp182-88) has described the existence of ‘surveillance democracy’ - continuous, automated surveillance – as being in conflict with values like autonomy that underpin democracy. As Eide (2016) states: “...surveillance of everyone...will clearly increase the fear of communicating and thus

³⁹ See detailed discussions below

⁴⁰ C.f. Greenwald, G. (2014). *Why Privacy Matters*. TED Talks in Rio de Janeiro October 10. 2014: www.youtube.com/watch?v=pcSlowAhvUk [Accessed: 07/02/18]

⁴¹ Since published (11/18) and available here: <https://en.unesco.org/fightfakenews>

limit citizens' free exchange of views, a vital part of a democracy." (Eide 2016 p.4) Heikkila (2016 p.101) has identified the need for citizens in democracies to access 'pockets of secrecy' to support experimentation with new political ideas and design public interventions – activities threatened by mass surveillance. This is especially true for journalists, their confidential sources, and whistleblowers.

According to former UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion, Frank La Rue, by 2013 States could achieve almost complete control of telecommunications and online communications "...by placing taps on the fibre-optic cables, through which the majority of digital communication information flows, and applying word, voice and speech recognition...." (UN General Assembly 2013⁴²) La Rue's successor, David Kaye⁴³, delivered his first report to the UN Human Rights Council in May 2015, highlighting the importance of anonymity and encryption as defences against surveillance: "Encryption and anonymity enable individuals to exercise their rights to freedom of opinion and expression in the digital age and, as such, deserve strong protection." (UN General Assembly 2015a) Kaye's report references the role of encryption in defending confidential communications between journalists and their sources. Professor Kaye's next formal report to the UN – delivered to the UN General Assembly in September 2015 - focused specifically on the need to protect journalists' sources and whistleblowers in the digital era. (Kaye 2015b) His official report cites *Protecting Journalism Sources in the Digital Age* (which was still forthcoming at the time) in several places.

Here:

Everyone depends upon well-sourced stories in order to develop informed opinions about matters of public interest. Professional reporting organizations emphasize that named sources are preferable to anonymous ones. Nonetheless, reporters often rely upon, and thus promise confidentiality to, sources who risk retaliation or other harm if exposed [Posetti 2015]. Without protection, many voices would remain silent and the public uninformed (Kaye 2015b p.7)

As well as here:

...any person or entity involved in collecting or gathering information with the intent to publish or otherwise disseminate it publicly should be permitted to claim the right to protect a source's confidentiality. Regular, professional engagement

⁴² Note: "The present report, submitted in accordance with Human Rights Council resolution 16/4, analyses the implications of States' surveillance of communications on the exercise of the human rights to privacy and to freedom of opinion and expression. While considering the impact of significant technological advances in communications, the report underlines the urgent need to further study new modalities of surveillance and to revise national laws regulating these practices in line with human rights standards"

⁴³ Prof Kaye is one of my expert interviewees for this exegesis. See Chapter Six.

may indicate protection, but its absence should not be a presumptive bar to those who collect information for public dissemination [Posetti 2015]. (Kaye 2015b p.9)

And here:

Protection must also counter a variety of contemporary threats. A leading one is surveillance. The ubiquitous use of digital electronics, alongside government capacity to access the data and footprints that all such devices leave behind, has presented serious challenges to confidentiality and anonymity of sources and whistle-blowers [Posetti 2015]. (Kaye 2015b p.11)

As discussed throughout *Protecting Journalism Sources in the Digital Age*, legal and normative defences designed to secure confidential sources are undercut if information leading back to sources is caught in the net - through both mass surveillance and unchecked targeted surveillance deployed by States and other actors. Different kinds of physical surveillance have historically impacted on source protection, but digital data has enabled a higher magnitude of surveillance, and the advent of cheap storage and processing power makes bulk surveillance feasible and far-reaching. Digital surveillance undercuts source protection because it gets around legal controls designed to protect sources by exposing them via indirect means. As the Committee to Protect Journalists' Dr Courtney Radsch⁴⁴ told me in an expert interview for the UNESCO study (Posetti 2017a):

...journalists (are) being caught up in essentially spy craft, getting surveilled and targeted. And there is so little transparency about this whole Five Eyes system - so many technology companies and related internet companies are based in five eyes nations. I think that we are really potentially looking at an environment where it becomes virtually impossible for journalists to protect their sources, one where journalists are no longer even needed in that equation given governments' broad surveillance powers.⁴⁵

In some countries, surveillance techniques are deployed as a specific means of intercepting information used to incriminate reporters (Posetti 2017a p.22; Bell & Taylor 2017). Experts interviewed for the UNESCO study indicated that surveillance could be legitimate and pointed to the "necessary and proportionate" conditions put forward by civil society groups,⁴⁶ but expressed concern about cases when there was a lack of legality, independent oversight, transparency or consideration for journalistic

⁴⁴ Dr Radsch is CPJ's Advocacy Director and former senior UNESCO freedom of expression expert. She is also one of the interviewees for this exegesis.

⁴⁵ Note: This quote is from an interview with Courtney Radsch recorded for *Protecting Journalism Sources in the Digital Age* in 2014. It was edited out of the book pre-publication by UNESCO (during internal review processes). However, it was published in *Trends in Newsrooms* 2015 by WAN-IFRA and the quote informed the study's findings.

⁴⁶ See <https://necessaryandproportionate.org/> [Accessed 20/07/18]

confidentiality.⁴⁷

3.4 The ‘trumping effect’ of national security/anti-terrorism legislation

Over the past decade, in parallel with the normalisation of mass surveillance, increasingly restrictive anti-terrorism and national security legislation has been enacted, overriding (and threatening to override) existing legal protections, including ‘shield laws’. (Fernandez 2017 pp202-18) This arises from moves to broaden the scope of ‘classified’ information and make exceptions to coverage, along with attempts to criminalise all disclosure of ‘secret’ information (including in some cases, the publication thereof) irrespective of public interest or whistle-blowing considerations. The result of the increasing risk to both journalists and their sources is a further constraining, or “chilling”, of public interest journalism dependent upon confidential sources. (Posetti 2017a⁴⁸)

Banisar (2007) noted that: “A major recent concern...is the adoption of new anti-terrorism laws that allow for access to records and oblige assistance. There are also problems in many countries with searches of newsrooms and with broadly defined state secrets acts which criminalise journalists who publish leaked information.” (Banisar 2007 p.64) This threat has escalated dramatically in the intervening years, as a parallel to digital development, and occurs where it is un-checked by measures designed to preserve fundamental rights to freedom of expression and privacy, as well as accountability and transparency. In practice, this leads to what I have described as a ‘trumping effect’, where national security and anti-terrorism legislation effectively take precedence over legal and normative protections for confidential journalistic sources (Campbell 2013). Further, the classification of information as being protected by national security or anti-terrorism legislation has the effect of increasing the reluctance of sources to come forward.

3.4.1 Historical context: the paranoid state

During World War II, Weber (1946) discussed the response of ‘paranoid’, ‘insecure’ institutions during times of conflict, saying that a culture of secrecy prevailed with the ‘official’ version of events frequently relying on deception, disinformation and misinformation (Campbell 2013)⁴⁹. But Weber noted that “Bureaucratic administration always tends to be an administration of the ‘secret session’; in so far as it

⁴⁷ Note: These issues are examined in detail in Thematic Study 3 of *Protecting Journalism Sources in the Digital Age* pp120-33

⁴⁸ Note: These issues are examined in detail in Thematic Study 3 of *Protecting Journalism Sources in the Digital Age* pp120-33

⁴⁹ See also Ireton C Posetti, J (2018) *Journalism, ‘Fake News’ and Disinformation* UNESCO. Paris. Available: https://unesdoc.unesco.org/ark:/48223/pf0000265552_eng; Posetti, J and Matthews, A (2018) *A short guide to the history of ‘fake news’ and disinformation*. International Center for Journalists, Washington D.C. : https://www.icfj.org/sites/default/files/2018-07/A%20Short%20Guide%20to%20History%20of%20Fake%20News%20and%20Disinformation_ICFJ%20Final.pdf [Accessed 23/07/18]

can, it hides its knowledge and action from criticism.” (Weber 1946 p.233) Gardner (2016) has traced the rise of the ‘national security state’ in the United States from World War II, to Daniel Ellsberg’s leaking of the Pentagon Papers to *The New York Times*, through to the *Washington Post*’s Watergate coverage dependent upon ‘Deep Throat’, and on to Snowden’s revelations. He argues that successive administrations persisted in using their national security powers not so much to punish foreign agents but rather to pursue protestors, leakers and the journalists they leak to (Gardner 2016).

The specific risk in the post 9/11 environment was signalled by Banisar (2008): “Terrorism is often used as a talisman to justify stifling dissenting voices in the way that calling someone a communist or capitalist were used during the Cold War.” (Banisar 2008 p.4) According to Banisar’s report for the Council of Europe (COE), following the 2001 terrorist attacks many European countries adopted new laws or expanded the use of old laws to monitor communications. Pozen (2010) has said that post-9/11, “The use of state secrets appears both more pervasive in practice and more discredited in the public mind than at any point in history.” (Pozen 2010 pp257) The unprecedented scope and scale of surveillance experienced in the 21st century is partly a product of the internet’s central business model, according to Richards (2013). “It used to cost states money and resources to spy on its citizens, now thanks to technology we have a variety and scope of surveillance that is unprecedented in human history.” (Richards 2013 p.1936)

As Brooke (2016) has observed, ironically while each Islamic-inspired terrorist attack perpetrated on Western soil elicits promises from politicians that terrorists will not destroy democratic values and freedoms, they at once commence or tighten restrictions on freedom of expression or undercut existing protections of the liberties that differentiate democracies from totalitarian states. “The state views the disclosure of its own secrets as a matter of the utmost seriousness, as an existential threat and this is the reasoning behind the often brutal and disproportionate response which I saw first-hand while reporting on Wikileaks and subsequent leaks.” (Richards 2016 p.1936)

In the context of international 21st century terrorism, States increasingly trade off rights like privacy and freedom of expression against responsibilities for security and safety. Weber’s paranoid institutions are now on a permanent war footing, with ‘the war on terror’ justifying permanent omniscient surveillance and interception. As Gardner (2016) wrote: “Since 9/11, intelligence agencies have accrued even more power and have employed the act and other laws to pursue the likes of Bradley Manning⁵⁰ and Edward Snowden, to ensnare journalists—Glenn Greenwald, James Risen⁵¹, and Michael Hastings, among others—who convey classified information not to the enemy but to the public.” (Gardner 2016)

⁵⁰ Note: Manning has had gender reassignment surgery and she is now known as Chelsea Manning

⁵¹ Note: I interviewed James Risen for this exegesis. See later discussion

3.4.2 National security and the expansion of the surveillance state

Banisar (2008) noted the development of a “worrying trend in the use of both authorised and unauthorised electronic surveillance to monitor journalists by governments and private parties to track their activities and identify their sources”. (Banisar 2008 p.10) According to Banisar, most of the incidents were authorised under the broad powers of national laws or undertaken illegally, in an attempt to identify the sources of journalistic information. These laws expand surveillance in a number of ways (Banisar 2008 p.10):

- *Extending the range of crimes that interception is authorised for;*
- *Relaxing legal limitations on approving and conducting surveillance including allowing for warrantless interception in some cases;*
- *Authorising the use of invasive techniques such as Trojan horse and remote keystroke monitoring to be used;*
- *Increased demand for identification of users of telecommunications services.*

Gillian Phillips, Director of Editorial Legal Services of *The Guardian*, specifically referenced the implications of governments invoking national security and anti-terrorism measures that interfere with protections for journalists and their sources in the post 9/11 environment. Calls for unlimited monitoring and use of modern surveillance technologies to access all citizens’ data, under the guise of national security necessity, directly challenge journalists’ rights to protect their confidential sources, she said, pointing to the escalation of such interventions in the aftermath of terrorist attacks from 9/11 to the Charlie Hebdo massacre in Paris. (Nolan 2015)

The Charlie Hebdo killings and the ease with which terrorists have managed to launch attacks in mainland Europe, give rise to calls for unlimited monitoring and use of modern surveillance technologies to snoop and access all citizens’ data, which directly challenges journalists’ rights to protect their confidential sources, for example.” (Nolan 2015)

While recognising widespread source protection legislation she said: “legal protections are not worth the paper they are written on if technical developments allow states to go behind those protections in secret”. (Nolan 2015)

According to the Director of Canada’s Centre for Law and Democracy, Toby Mendel, the main issue is the redefinition of national security in the current climate.

The problem is not so much new rules...but a changing understanding of national security. In particular, when national security becomes equated with the risk of

terrorist actions, which can theoretically be undertaken by anyone, the issue becomes far more generalised, and so the risk to source protection becomes far more serious. (Posetti 2017a p.20)

3.4.3 Implications for journalists and source protection

Privacy International's Tomaso Falchetta highlighted a major problem with regard to the impact of anti-terrorism and national security legislation on journalistic source protection in his interview for *Protecting Journalism Sources in the Digital Age*:

...Most laws regulating interception and surveillance do not specifically recognise additional rights for journalists. This is particularly so with regards to counter-terrorism legislation that provides for expansive powers of state surveillance without making provisions for protection of journalists' sources. Traditional national security laws and new counter-terrorism laws adopted in numerous countries give authorities extensive powers to demand assistance from journalists, intercept communications, and gather information. (Posetti 2017a p.20)

Like other experts interviewed about these themes for the UNESCO study, US journalist and press freedom advocate Josh Stearns acknowledged that there are, in limited circumstances, security reasons for compelling journalists to reveal their sources. He cautioned, however, that "too often the blanket of national security is thrown over things that probably aren't a good fit, or it is used too expansively." (Posetti 2017a p.20)

This complexity is evident in Australia, where national security and anti-terrorism grounds have been invoked to classify information on asylum seeker arrivals and detention, requiring most journalism undertaken on boat arrivals and immigration detention centres to be dependent upon confidential sources. However, revelation of any such classified information has now been criminalised (Farrell 2015b), exacerbating the chilling effect. Journalists have been reported to the Australian Federal Police (AFP) by Australian government agencies with requests that the police assist with identifying the sources of the leaks (Farrell 2015a; Fernandez 2017).

A report by *The Guardian* (Ball 2015), based on files leaked by Edward Snowden, highlighted the potential controversy in this area. It stated that a UK Government Communications Headquarters (GCHQ) information security assessment had listed "investigative journalists" alongside terrorists and hackers in a threat hierarchy. This approach manifested in the arrest of David Miranda at Heathrow airport in 2013 as he attempted to transport documents connected to Edward Snowden's revelations. Miranda, the partner of the man who broke the Snowden story – lawyer and then *Guardian* journalist Glenn Greenwald – was held for nine hours under the Terrorism Act while in transit. (Doward 2013)

Walker (2017) contends that Greenwald, *The Guardian* and Miranda viewed their mission as one of “ethical disclosure in the public interest of a vast web of governmental surveillance programmes”. (Walker p129) But MI5 insisted that Miranda was involved in ‘terrorism’ (as defined in the U.K. Terrorism Act 2000) because his mission sought to influence the government by promoting a political or ideological cause. Walker concludes:

...complex linkages between journalistic activities and the label of ‘terrorism,’ which is becoming a primary threat to investigative journalism in the contemporary world. It will require reflection upon the conceptual nature of terrorism and journalism in a setting of ethics, public policy, and law. (Walker p129)

Former Special Rapporteur on Freedom of Expression at the Inter-American Commission on Human Rights Dr Catalina Botero has stated that some governments use tools to block and threaten and spy on journalists: “Not because of security reasons, but because of the need to control what’s going on in the public sphere”. (Posetti 2017a p.21) Globally, these issues point to the need for law reform according to Media Legal Defence Initiative CEO Peter Noorlander: “Existing national security and search and seizure laws should be amended to strengthen source protection.” (Posetti 2017a p.21)

These issues also impact on anonymity and encryption, which are enablers of the right to privacy, and which each has great relevance to the confidentiality of journalistic sources (Kaye 2015a). Linked to these are real-name registration systems for electronic communication, which potentially expose reporters and their communications with sources to undue scrutiny. There is also a potential chilling effect on sources who often prefer to contact reporters via anonymous or pseudonymous accounts and encrypted communications tools. The same applies to the legal regime concerning encryption, which is also increasingly affected by national security considerations, with Five Eyes countries moving towards forcing third parties (e.g. phone companies, ISPs and social media companies) to either provide pre-installed back-door access within devices or to assist in decrypting content (Human Rights Watch 2017)⁵². Heikkila (2016) has observed that “While intelligence agencies are said to look at those pockets of secrecy that threaten security, these agencies’ activities can also root out all dissent and political creativity.” (Heikkila 2016 p.101) They can also interfere with accountability journalism dependent upon communications with confidential sources.

Eide (2016) highlighted another consequence of incursions on journalistic source protection in cases where the source is suspected of association with terrorism. Through a comparative analysis of instances in Afghanistan, the UK, and Norway, she demonstrated that “both the right to access extremist sources and the right to protect such sources are fragile”. (Eide 2016 p.1) Terrorist incidents are seen to intensify calls for increased mass surveillance and intrusion into journalists’ investigative work which seeks to understand the motivations and triggering experiences of those involved in

⁵² See detailed discussion on third party intermediaries in the next section

terrorist networks or at risk of becoming affiliated – journalism of inarguable public interest value, according to Eide, in the context of global efforts to counter violent extremism through social cohesion strategies.

There is a clear need to ‘decouple’ secrecy from privacy. The former is corrosive, while the latter is defensive. In the words of former World Bank Vice President and Chief Economist Joseph Stiglitz (1999), secrecy is:

...antithetical to democratic values, and it undermines democratic processes. It is based on a mistrust between those governing and those governed; and at the same time, it exacerbates that mistrust... [In the 20th century] in country after country, it is the secret police that has engaged in the most egregious violations of human rights (Stiglitz 1999 p.1)

This is why the abuse of national security and anti-terrorism legislation to suppress critical accountability-motivated reportage of government policy and the actions of politicians in the absence of necessity and proportionality, and in some cases through the criminalisation of journalism (Greste 2018), is particularly egregious to freedom of expression rights.

3.5 The role of third-party intermediaries, data retention and metadata breaches

The long-term storage, handover, interception, and capture of data by third party intermediaries (McKinnon et al 2014) is compounding the impacts of surveillance on source protection and confidential source-dependent journalism globally. This is the third theme emerging from the literature, case law, and the research underpinning this PhD dissertation (across both the major study and exegesis) in the form of surveys and expert interviews.

In the UNESCO publication *Fostering Freedom Online: The Role of Internet Intermediaries* (MacKinnon et al 2014), the authors cite the Organisation for Economic Co-operation and Development’s (OECD) definition of Internet intermediaries as entities that ‘bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.’ Most definitions of internet intermediaries explicitly exclude content producers. If ISPs, search engines, telcos, and social media platforms, for example, can be compelled to produce electronic records (stored for increasingly lengthy periods under mandatory data retention laws) that identify journalists’ sources,

then legal protections that shield journalists from disclosing confidential sources may be undercut by backdoor access to the data. (Human Rights Watch 2017)⁵³

A 2014 UN Office of the High Commissioner for Human Rights Report, *The Right to Privacy in the Digital Age* concluded that there is a pattern of:

...increasing reliance of Governments on private sector actors to retain data 'just in case' it is needed for government purposes. Mandatory third-party data retention – a recurring feature of surveillance regimes in many States, where Governments require telephone companies and internet service providers to store metadata about their customers' communications and location for subsequent law enforcement and intelligence agency access – appears neither necessary nor proportionate. (UN OHCHR 2014)

Privacy International legal officer Tomaso Falchetta said: “there is a growing trend of delegation by law enforcement of quasi-judicial responsibilities to Internet and telecommunication companies, including by requiring them to incorporate vulnerabilities in their networks to ensure that they are ‘wire-tap ready’.” (Posetti 2017a p.25) This was a point emphasised by the UN High Commissioner for Human Rights’ in her report on the right to privacy in the digital age in 2014. (UN OHCHR 2014)

Increasingly, States are introducing mandatory data retention laws. Such laws require telecommunications and Internet Service Providers (ISPs) to preserve communications data for inspection and analysis, according to a report of the Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. (UN GA 2014) In practice, this means that data on individuals’ telecommunication and internet transactions are collected and stored even when there is no suspicion of criminal activity. (EFF 2011)

Some of the data collected under these policies is known as metadata. Metadata is data that defines and describes other data, or as the Electronic Frontier Foundation’s Peter Eckersley has put it, “Metadata is information about what communications you send and receive, who you talk to, where you are when you talk to them, the length of your conversations, what kind of device you were using and potentially other information, like the subject line of your emails.” (Wise & Landay 2013) Advocates of long-term metadata retention insist that there are no significant privacy or freedom of expression threats.⁵⁴ “However, even when journalists encrypt the content, they may neglect the metadata, meaning they still leave behind a digital trail when they communicate with their sources. This data can easily identify a source, and safeguards against its illegitimate use are frequently limited, or non-existent”. (Posetti 2017a citing Noorlander p.26)

⁵³ For a detailed analysis of this theme across Africa, Arab States, Europe and North America, and Latin America and the Caribbean, see Posetti, J (2018) *Protecting Journalism Sources in the Digital Age* pp 57-101.

⁵⁴ C.f. Australian Attorney General George Brandis’ defence of that country’s data retention policies <http://www.skynews.com.au/culture/showbiz/tv/2015/03/23/metadata-grilling-gains-logie-nomination.html>

For these reasons, former Editor-in-Chief of *The Guardian* Alan Rusbridger has observed that it may no longer be possible for journalists to promise sources that they will protect them. (Posetti 2018c) And there may be no need for journalists to do jail time after refusing to reveal a source in a court of law because a State or corporate actor could simply identify a source through metadata excavation and analysis. (Bell & Owen 2017)

Australia's former Press Council Chair, Professor David Weisbrot has said that mandatory data retention legislation that fails to protect journalistic communications risks "crushing" investigative journalism:

I think that whistleblowers who are inside governments or corporations will definitely not come forward because their confidentiality and anonymity will not be guaranteed. If they came forward, a journalist would have to say: 'I have to give you some elaborate instructions to avoid detection: don't drive to our meeting, don't carry your cell phone, don't put this on your computer, handwrite whatever you're going to give me.' (Meade 2015)

Senior Lawyer (the with Australia's Law Institute of Victoria), Leanne O'Donnell highlighted the problem in her country with regard to 2015 legislation that allowed law enforcement officials to access journalists' metadata without a warrant. Additionally, there was no exemption for journalistic communications in data retention policies. She added that there were also no protocols that could assist ISPs, and other companies to determine if official handover requests apply to journalistic communications. There had been, therefore, no legal provision or practical protection for journalistic data, she stated. (Posetti 2017a p.25) The situation was partially addressed in Australia through the passage of amendments requiring the issue of warrants to access journalists' metadata and the appointment of a Public Interest Advocate to assess such warrant applications. (Griffiths 2015) However, Australian media lawyer and commentator Richard Ackland has noted that the so-called 'journalists information warrants' are "warrants in name only" and operate within a system of secrecy (with sanctions and penalties applied to journalists who reveal the very existence of the warrants) that lacks appropriate appeal capacity. "Hand-picked 'public interest advocates' – chosen by the prime minister, no less – are on tap to make submissions. The journalist whose information is being sought by the warrant is not informed and cannot make submissions to the issuing authority." (Ackland 2015)

Former *Guardian Australia* investigative journalist Paul Farrell discovered in early 2015 that he was one of several reporters targeted by the Australian Federal Police (AFP) in source-hunting investigations connected to journalism about asylum seekers, migration policy and Australia's system of offshore detention of boat arrivals. (Farrell 2015a)⁵⁵ In February 2016, Farrell extracted documentary proof from

⁵⁵ See the redacted AFP documents released under the Australian Freedom of Information Act here: <https://www.theguardian.com/australia-news/ng-interactive/2015/jan/22/journalists-reported-to-afp-in-bid-to-reveal->

the AFP that they had amassed a 200-page dossier on him in reference to the aforementioned leak investigations. (Farrell 2016) Two months later, Farrell was advised by the Australian Privacy Commissioner that the AFP had accessed his metadata – largely pertaining to emails - the previous year without a warrant. (Meade 2016)⁵⁶ This was, technically, a legal breach of journalists' privilege at the time it occurred – prior to the legislative amendments requiring a warrant to access a journalist's metadata. It was the first time the Australian public had been made aware of such a case.

Edward Snowden – the NSA whistleblower whose unprecedented revelations ultimately triggered the commissioning of the study at the core of this dissertation – was drawn to comment on the AFP's targeting of Paul Farrell: "The Australian Federal Police are defending such operations as perfectly legal, but that's really the problem, isn't it? Sometimes the scandal is not what law was broken, but what the law allows." (Ackland & Laughland 2016) Director of the Committee to Protect Journalists' Technology Program, Geoffrey King described the breach as outrageous: "This should not be happening. But it is the inevitable result of mandatory data retention and mass surveillance, which is neither necessary nor proportional to any threat," King said. "It doesn't line up with the values that we all adhere to, to good counter-terrorism strategy, and it certainly doesn't line up with a free and open society where journalists can do their jobs. (Ackland & Laughland 2016 p.?) Farrell could be considered a model of good practice for journalists seeking to produce reportage from their own experiences of surveillance and interception by the state in an effort to broaden public awareness of the risks, as suggested in Chapter Five.⁵⁷

The following year, on April 28th – one day after *Protecting Journalism Sources in the Digital Age* was published by UNESCO (UNESCO 2017b) - the AFP held an extraordinary press conference admitting that they had accessed an unnamed reporter's metadata without a warrant - that is, illegally. The AFP commissioner, Andrew Colvin, admitted that officers were seeking to identify the source of a leak involving the provision of 'confidential police information to a journalist' when the breach occurred. "It should not have occurred, the AFP takes it very seriously ... and we take full responsibility for breaching the act," Colvin told journalists during a televised press conference. Paul Murphy, Chief Executive Officer of Australian journalists' union, the Media Entertainment and Arts Alliance, said the breach demonstrated an "over-zealous and cavalier approach" (Knauss 2017) to accessing metadata:

...there is very little understanding of the press freedom concerns that we have been raising with politicians and law enforcement officials for several years now...

[sources-read-the-documents](#) [Accessed 20/7/18]

⁵⁶ See the AFP documents pertaining to Farrell's case here: <https://www.scribd.com/doc/298816051/Paul-Farrell-AFP-Decision-Letter-and-Documents> [Accessed 20/7/18]

⁵⁷ Note: Farrell was one of the journalists featured in the panel discussion at the Australia launch event for *Protecting Journalism Sources in the Digital Age* in November 2017.

The use of journalist's metadata to identify confidential sources is an attempt to go after whistleblowers and others who reveal government stuff-ups. (Knauss 2017)

The limited judicial oversight of access to journalists' metadata evident in these Australian cases is also an issue globally, raising significant accountability issues. Dupere (2015⁵⁸) has noted that in the UK the "covert practice of blanket mass digital surveillance of individual communications including journalists' [was] undermining source protection" along with the "unknown extent of covert requests by public authorities for disclosure involving communications data and metadata". (Dupere 2015 p.278) The absence of transparency is also a problem, with journalists in many cases barred, under threat of penalty or imprisonment, from publicly disclosing that their metadata has been accessed by authorities even if they do discover a breach. UK QC Gavin Millar, then Chair of the Centre for Investigative Journalism at Goldsmith's University in London, told me in an interview for *Protecting Journalism Sources in the Digital Age* that countries like the UK have used covert powers to deny journalists knowledge of requests for access to their data (including metadata):

...you get the judge involved but still the journalist doesn't know about it. And the position of the NUJ [National Union of Journalists], and the International Federation of Journalists...is that that's not enough. The issue is: do you put the journalist on notice of the possibility? Then you can't just have covert access to journalistic source material. (Posetti 2017a p25⁵⁹)

The need to include the metadata attached to journalistic communications in any limitations applied to the reach of data retention laws is also highlighted by the legal and legislative developments, along with a range of associated incidents identified in *Protecting Journalism Sources in the Digital Age*. The Media Legal Defence Initiative director Peter Noorlander said that many legislators do not realise the very real threat to privacy and media freedom posed by the collection of metadata. Also in an interview for the major artefact, Columbia University's Susan McGregor called for legislation in the US to declare metadata private because of what it reveals about people's personal lives (and, in the case of journalists, their confidential communications with sources). (Posetti 2017a p.26)

As the Council of Europe's 2016 report *Mass Surveillance: Who is Watching the Watchers?* Noted, the Five Eyes' interconnected system of surveillance is "aimed at collecting, storing and analysing communication data, including content, location and other metadata, on a massive scale." (COE 2016) These patterns also ensnare journalists (Posetti 2018d, Posetti 2018b) with the 'needle in the haystack' (Eide 2016) argument used to justify scooping up their metadata in the net.

⁵⁸ Dupéré, M (2015) *Protecting sources: from shield laws to Wikileaks* Brazilian Journalism Research 11(1): pp 278-91.

⁵⁹ Note: This quote is taken from a pre-publication version of *Protecting Journalism Sources in the Digital Age* which was paraphrased during UNESCO's final edit.

There is also the aforementioned habit of ubiquitous ‘social sharing’ that leads journalists to self-exposure through publicly posting, tagging, time-stamping, checking in, and so on, as Andrejevic has discussed.

There is a price to be paid for convenience and customization – and we will likely end up paying it not just by sacrificing privacy, but by engaging in the work of being watched: participating in the creation of demographic information to be traded by commercial entities for commercial gain and subcontracted forms of policing and surveillance. (Andrejevic 2007 p98)

According to Podkowiak (2014), surveillance undertaken without a journalist’s consent should be considered as an act of interference with the protection granted by Article 10 of the European Convention on Human Rights. He proposed that interference with journalistic confidentiality by means of secret surveillance should be recognised at least as equally onerous (or even more onerous) as searches of a home or a workplace. “[It] seems that in the digital era, it is necessary to redefine the scope of the protection of journalistic privilege and to include in that scope all the data acquired in the process of communication, preparation, processing or gathering of information that would enable the identification of an informant,” Podkowiak wrote. (Podkowiak 2014 p.3)

3.6 Risks to journalism in the context of broadening definitions and entitlement to access protections

In this digital and security-driven context, it becomes important to extend legal source confidentiality protection to all acts of journalism, not just to issues of identification after the publication of content based on confidential communications, but also to related prior digital reporting processes and journalistic communications with sources. (Posetti 2017a p.12)

This is a central theme of *Protecting Journalism Sources in the Digital Age*. Additionally, the importance of debating which journalistic actors qualify for source protection in the digital era – and where there is a need to answer questions like ‘Who can claim entitlement to source confidentiality protection laws?’ – is recognised.

The persistent and complex questions “Who is a journalist?” and “What constitutes journalism?” are pertinent. Broadening the legal definition of ‘journalist’ to ensure adequate protection for non-professional reporters (working on and offline) is logical, and in some countries case law is catching up gradually on this issue of redefinition. (Posetti 2017a p.26⁶⁰) However, it also opens up debates about classifying journalists, and even about licensing and registering those who do journalism - debates that

⁶⁰ Note: See the regional analysis sections of the study for elaboration: pp57-102

are particularly potent where there is a history of State controls over press freedom, including censorship and the criminalisation of journalism. These themes are evident across industry and scholarly research on the issue of entitlement to access source protection laws.

Various scholars (Russell 2014 p.193), journalism organisations and press freedom advocacy groups (c.f. Stearns 2013) have recently recognised this change in the landscape and proposed protecting journalism sources from legal repercussions by not limiting the protection to professional journalists. Many stakeholders have argued in favour of legal protections being defined in connection with ‘acts of journalism’, rather than through the definition of the professional functions of a journalist. These have bearings on the protection of both journalists and sources in the digital age. In December 2013, the UN General Assembly adopted a resolution which outlined a broad definition of journalistic actors that acknowledged that: “...journalism is continuously evolving to include inputs from media institutions, private individuals and a range of organisations that seek, receive and impart information and ideas of all kinds, online as well as offline, in the exercise of freedom of opinion and expression.” (UNGA 2013) In 2014, the intergovernmental Council of UNESCO’s International Program for the Development of Communication (IPDC)⁶¹ welcomed the UNESCO Director-General’s Report on the Safety of Journalists and the Danger of Impunity, which uses the term ‘journalists’ to designate the range of “journalists, media workers and social media producers who generate a significant amount of public-interest journalism”. (UNESCO 2016)

Many legal definitions of ‘journalist’ have been evaluated as overly narrow, as they tend to emphasise official contractual ties to legacy media organisations, may demand a substantial publication record, and/or require significant income to be derived from the practice of journalism. This leaves confidential sources relied upon by bloggers and citizen journalists largely unprotected, because these producers of journalism are not recognised as ‘proper journalists’, even when their output is clearly public interest journalism. There are many parallels between investigative journalism and the work undertaken by human rights organisations – organisations that depend upon confidential sources for information about human rights abuses. Such organisations now also often publish directly to audiences and are arguably engaged in ‘acts of journalism’. One relevant example involves an Amnesty International case from 2015 in which Amnesty objected to having been a subject of surveillance (Amnesty International 2015a, 2015b). Such definitions also exclude the growing group of academic writers and journalism students, lawyers, human rights workers and others, who produce journalism online, including investigative journalism (Posetti 2017a p103-133).

These themes have resonance globally. As detailed in *Protecting Sources in the Digital Age*, Egyptian Media Studies Professor Rasha Abdullah would like to see source protection made accessible to a broad

⁶¹ Dr Guy Berger, the UNESCO Director who commissioned *Protecting Journalism Sources in the Digital Age* and was interviewed for this exegesis is also Secretary of the IPDC

range of communications actors: “It should apply to anyone who has information to expose, particularly in the age of digital media”. (Posetti 2017a p27) Arab Reporters for Investigative Journalism’s (ARIJ) Rana Sabbagh, echoed Abdullah’s call, saying: “...credible bloggers who are using reliable documents and are exposing corruption and injustice have to have some form of protection” (Posetti 2017a p27).

In 2013, the US Society of Professional Journalists passed a unanimous motion that “strongly rejects any attempts to define a journalist in any way other than as someone who commits acts of journalism”. (SPJ 2013) Russell (2014), in her analysis of attempts to define “journalist” in the context of US shield law debates, argued that: “Shield laws should be designed to protect the process through which information is gathered and provided to the public, not the status of the individual or institution collecting it.” (Russell 2014 p.193) She noted that a number of US jurisdictions already define journalism in such a way. In the state of Nebraska, for example, the shield law states “[n]o person engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public” shall be required to disclose a confidential source or information provided by that source in any federal or state proceeding.

In the view of US journalist and press freedom activist Josh Stearns: “we need to look at the acts of journalism rather than defining a particular type of person...defining an act is safer and more consistent with how media is created and consumed today, and (it) provides a stronger basis for protection.” (Stearns 2013) Interviewed for the UNESCO study, he further said:

Even those who are blessed with journalism jobs and would fit all the qualifications that would protect such a person under law may not act in such a way as deserves protection. By orienting around an act, and protection of an act, we then hopefully establish actions that are for the public interest and have all these sets of qualities rather than just protect a person who automatically lumps in and excludes people who should otherwise be included. (Posetti 2017a p.28)

As Stearns also observed, “Given how much flux exists in the journalism world, how can we create boundaries around an idea while leaving enough flexibility to account for an unknown future?” (Stearns 2013)

In many contexts, however, without strong press freedom overrides, journalists themselves are liable for publication of leaked information, irrespective of source confidentiality issues. In such cases, they too need protection in terms of public interest defences being recognised in law and by the courts. In other words, confidentiality protection as such does not necessarily shield publication, even where it does assist sources to avoid identification. The significance of this is that where there are no other

protections (e.g. whistleblower protection legislation) to complement confidentiality protection, there can nevertheless be a chilling of disclosures of public interest information (Posetti 2017a).

Central to these debates is the deployment of a ‘public interest test’ as a measure for assessing the entitlement for a journalistic actor to claim access to source protection frameworks. The term ‘in the public interest’, as it applies to acts of journalism, is not clearly defined and it is a complex concept. Moore (2007) argues that public interest journalism has two elements (Moore 2007 p.33):

1. *“...it is as a watchdog, holding the powerful to account, exposing fraud, deceit, corruption, mismanagement and incompetence... This watchdog role is (also) important...because those in power know they’re being held to account.”*
2. *“This is the responsibility to inform, explain and analyse. Public-interest journalists find, digest and distil information that helps the public form views and make decisions.”*

Tension over the application of a public interest test to source protection legislation is explored in detail in the third major thematic study featured in *Protecting Journalism Sources in the Digital Age*.⁶² As discussed there, application of such a test may, in some cases, have the effect of inadvertently excluding certain acts of journalism from source protection provisions. This concept needs further interrogation in reference to the development of shield laws, and it points to the need for a case-by-case assessment of the specific journalistic acts for which confidentiality is sought.

3.7 The lack of protections and the impacts on journalism and journalism practitioners

“We create vast tracts of data - from internet connection records to communications data – and this information can tell interested parties everything about a reporter, the story they’re pursuing, and the source they’re protecting,” (Townend & Danbury 2017 p.3) current *Guardian* Editor-in-Chief Kath Viner observed in a 2017 report for the UK parliament on 21st century source protection risks. Such risks occur in a reporting environment where digital contact with sources is more likely than in-person contact, and where law enforcement agents are able to access journalists’ data without the journalists or their sources ever knowing.

⁶² See Thematic Study 3: Towards an international framework for assessing source protection dispensations in the Digital Age in Posetti, J (2017a) pp 120-33.

Dozens of international journalists, editors, lawyers and freedom of expression experts were interviewed⁶³ for *Protecting Journalism Sources in the Digital Age* to aid in the identification of source protection erosion impacts during the decade from 2007. The study concluded that there were myriad impacts on journalistic processes and practices internationally. The UNESCO study also mapped adaptations being undertaken by journalism practitioners and newsrooms in an attempt to shield sources from increasing risks of exposure. (Posetti 2017a⁶⁴) But it also acknowledged that threats to anonymity and encryption undermine these adaptations. The results, the study found, include more reluctant sources, more tedious reporting strategies, and the risk that much public interest journalism will be hampered in the future. So, the attention of investigative journalists and their editors is now necessarily turning to risk assessment, self-protection and source education – a process which has led to considerable reflective practice by journalists internationally, highlighting the scope and extent of the issues (Eide & Kunelius 2018 p.75).

3.7.1 Impacts of mass surveillance and device seizure

As discussed earlier in this chapter, anti-terrorism and national security laws are increasingly used to justify the targeting of journalists for surveillance and the capture of journalistic communications in mass surveillance nets. One case of the direct undercutting of confidential source protection by mass surveillance occurred in July 2015, in the context of a German parliamentary investigation into the surveillance of German citizens in 2011. During the course of questioning, a German intelligence chief revealed that *Der Spiegel* journalists had also been under surveillance and that a CIA official stationed in Berlin had revealed the identity of one of the journalists' confidential sources to the German government. (Tapper 2015) Further, documents linked to Edward Snowden published by *The Guardian* in 2015 revealed that the UK's GCHQ (Government Communications Headquarters) had siphoned emails from some of the world's top news organisations – the BBC, *The Guardian*, *Le Monde*, Reuters, *The New York Times* and *The Washington Post* among them – for internal distribution and analysis, having ranked news organisations just below terrorist organisations in a threat hierarchy. (Ball 2015)

Citing *Protecting Journalism Sources in the Digital Age*, Glowacka et al (2018) noted that the use of surveillance technology to compromise the confidentiality of journalists' sources affects not just the right to freedom of expression, but also the observance of other human rights, like the right to privacy. The result is the undermining of the 'public watchdog' role of the press, they argue.

A US editor who responded anonymously to the first of three surveys connected to the UNESCO study (Posetti 2014e) argued that mass surveillance meant that newsrooms could not protect the anonymity of sources anymore, and that sources could also expose themselves through their electronic

⁶³ See Posetti, J (2017a) pp 121-22 for a full list of interviewees.

⁶⁴ See, in particular, Thematic Study 1 in *Protecting Journalism Sources in the Digital Age*

communications.⁶⁵ Similar concerns were expressed by Indonesian investigative journalist with TEMPO magazine, Wahyu Dhyatmika, and Pakistani investigative journalist Umar Cheema in interviews for the book. In the Philippines, investigative journalist Marites Danguilan-Vitug, a co-founder of that country's Center for Investigative Journalism, said that she believed her phone had been bugged, causing her to introduce additional security measures.

Founder of the Arabic Media Internet Network Daoud Kuttub said that he now operates on the assumption that everything he does is "being watched" and that governments and security services have access to his communications, and those of many other media actors in his region. This was a point echoed by Mexican journalist, and World Editors Forum Special Adviser on Journalists' Safety, Javier Garza Ramos. He said that journalists now operated under the assumption that they were under surveillance. (Posetti 2017a⁶⁶)

After *Protecting Journalism Sources in the Digital Age* was submitted for publication in mid 2015, the impacts of source protection erosion on journalists and journalism practice became more urgent and entrenched, and the academic literature has recently begun to feature case studies on the theme. Eide (2016) identified three cases of surveillance and data seizure impacting on confidential source-based journalism on extremist organisations being undertaken in Afghanistan, the UK and Norway. In 2007 a young Afghan journalist working for a Canadian TV station was arrested and accused of being a Taliban accomplice because he was in possession of some photos and videos depicting them. He spent almost a year in detention, accused of being an enemy combatant, without access to a lawyer, in the US-led Bagram prison. After his release, he had promised to write a book about his experiences, which he claimed included being tortured. But he was gunned down in Kandahar within months of being released. The second case explored by Eide demonstrates threats to journalists' access to information due to attacks on source protection in the context of national security justifications, (Eide 2016 pp107-116) In this instance, a BBC Newsnight reporter had his laptop seized by police in late 2015 under the UK Terrorism Act. Ian Katz, Newsnight's editor, said: "While we would not seek to obstruct any police investigation we are concerned that the use of the Terrorism Act to obtain communication between journalists and sources will make it very difficult for reporters to cover this issue of critical public interest." (Quinn 2015)

A similar case occurred in Norway in mid-2015 when a documentarian investigating radicalization of Norwegians being recruited to ISIS had video material seized by the police. The Norwegian Supreme Court ultimately ruled in his favour in November 2015 after he had lost in two lower courts. He described how his sources, who were not active terrorists, had become scared as a result of the police

⁶⁵ Note: Such concerns have led to the defensive alteration of journalistic practices. See detailed Thematic Study 1 of *Protecting Journalism Sources in the Digital Age*.

⁶⁶ See detailed Thematic Study 1 of *Protecting Journalism Sources in the Digital Age*.

intervention and wanted to pull their interviews.

Freedom to seek information from and about adversaries – be they brutal and extremist or not so brutal – seems to be a right in decline. These cases concern journalists’ fundamental right to access and protect their sources. If actions such as these are endorsed by an increasing number of powerful institutions and individuals, it will seriously hamper independent reporting, thus jeopardizing freedom of expression. (Eide 2016 p.111)

Outgoing Editor-in-Chief of *The Guardian* Alan Rusbridger was despondent about the threat to investigative journalism posed by the erosion of source protection when I interviewed him for the UNESCO study in 2015. “Well, I’m very gloomy,” he said. “The limitations on existing legal frameworks supporting source protection in the UK are coming thick and fast. It’s like fighting a ‘Zombie War’,” he said, waving his hands in exasperation. (Posetti 2015a) Rusbridger suggested that investigative journalism might not be possible in the post-Snowden era. That concern was echoed by the Committee to Protect Journalists’ Dr Courtney Radsch: “I think that we are really potentially looking at an environment where it becomes virtually impossible for journalists to protect their sources—where journalists are no longer even needed in that equation, given governments’ broad surveillance powers.” (Posetti 2017a p.25⁶⁷) Bolivian investigative journalist Ricardo Aguilar expressed serious concern about the reliability of legal source protection. He was charged with espionage and faced up to 30 years jail after refusing to reveal his source on a 2014 *La Razon* story. “...[M]ass surveillance, data retention and the appeal of [the] National Security category leaves the protection of secret sources in latent vulnerability,” he said. (Posetti 2017a⁶⁸)

Director of the US-based International Consortium of Investigative Journalists (ICIJ), Gerard Ryle, was similarly direct: “I would say as a general rule these days, much more than in the past, it’s very difficult to protect sources because of the fact that electronic communications can be back-tracked and people can be found much easier than they may have been in the past,” he said. (Posetti 2017 p105) Ryle, who oversaw the global collaborative investigative journalism projects Panama Papers (ICIJ 2016), Offshore Leaks (ICIJ 2013), Luxembourg Leaks (ICIJ 2014) and other major investigations, once faced the threat of jail in Australia while reporting on police corruption for *The Age*, after refusing to give up a source to an ombudsman’s inquiry⁶⁹.

Thematic Study 2 in *Protecting Journalism Sources in the Digital Age* - ‘How a state with one of the world’s oldest and constitutional legal source protection frameworks is responding and adapting to

⁶⁷ Note: This quote is taken from a pre-publication version of *Protecting Journalism Sources in the Digital Age* which was paraphrased during UNESCO’s final edit.

⁶⁸ Note: This quote is taken from a pre-publication version of *Protecting Journalism Sources in the Digital Age* which was paraphrased during UNESCO’s final edit.

⁶⁹ Interview for *Protecting Journalism Sources in the Digital Age* conducted December 2014.

digital threats' (Posetti 2017a pp112-19) - assesses the state of source confidentiality in Sweden. There, source protection legislation is so strong that journalists can be jailed for revealing their confidential sources, and top investigative journalists take extraordinary measures to protect them from the impacts of mass surveillance, and other risks. One of the threats identified by the director of the investigative unit at Sweden's national public radio (Sveriges Radio), Fredrik Laurin, is that of police seizing digital content due to gaps in source protection legislation in his country: "...It's not an exception—this is definitely the modus operandi. The police, they don't go into newsrooms very often here, but when they do, they have no problem in grabbing digitally stored information." (Posetti 2017a⁷⁰)

3.7.2 The chilling effect

Co-founder of Pakistan's Centre for Investigative Reporting Umar Cheema was convinced he was under surveillance, and that his sources were aware of this, when he was interviewed for *Protecting Journalism Sources in the Digital Age*: "I am a prominent journalist, a distinction with its own advantages and disadvantages. Some [sources] tend to approach me out of respect and belief that I am the right person to be taken into confidence. Others hesitate, fearing any contact with me will put them on [the] radar screen since I am under surveillance, from phone to emails, and [my] social media accounts are monitored." (Posetti 2018c) Cheema was kidnapped and tortured in 2010 and in the course of his captivity, according to his account, his sources were compromised. "The captors, who I strongly suspect belonged to our premier intelligence agency, took away my mobile phone, apparently for investigating in detail about my professional contacts through my phone contacts," he said. (Posetti 2018c) "Some of my sources, who had shared information about national security, were coerced into silence. They never contacted me afterwards, other than telling me ... about the harassment they had to face." (Posetti 2018c) Cheema said that threats to his safety sent via phone and email had become routine. (Posetti 2017a p68) In the UNESCO study, International Editor of Algeria's *El Watan* newspaper, Zine Cherfaoui, said that sources increasingly required face-to-face meetings:

Since Snowden and mass surveillance, sources speak with difficulty and people don't have as much confidence. To really discuss with people we prefer to avoid electronic means or social networks. The Snowden Affair turned upside down the work of journalists. ... It's harder to speak to people. We really have to go out and meet them. It's face-to-face," (Posetti 2017a p.105)

The cost of digital security technology, training and legal fees connected to source protection in the post-Snowden era also represents a significant chilling effect on investigative journalism identified in the

⁷⁰ Note: This quote is taken from a pre-publication version of *Protecting Journalism Sources in the Digital Age* which was paraphrased during UNESCO's final edit.

literature (Bell & Owen 2017). In 2015, *The Guardian* was spending about a million pounds more a year on legal fees than five years earlier, according to former Editor-in-Chief Alan Rusbridger. “It’s definitely having a bad effect on the overall ability to report,” he said. “Of course, once you get into secure reporting there is a significant cost ... in trying to create a safe environment where we feel we can offer our sources the kind of protection that they deserve.” Rusbridger pointed to the devastating impact of the changed landscape on regional newspapers, in particular. “[They] can’t afford to get tied up in defending their staff, or equipment, or the IT.” (Posetti 2017a p106)

The findings of two PEN America surveys provide further empirical evidence to support the findings of the major thematic study on journalism practice within *Protecting Journalism Sources in the Digital Age*. According to a 2013 PEN report, 85 percent of writers were worried about contemporary levels of government surveillance, and the assumption that they were under surveillance caused some writers to self-censor their work. More than a quarter of them said they were now reluctant to write or speak about certain subjects, and 27 percent had limited their communications with sources or friends abroad (Pen America 2013). A follow-up survey in 2015 with an international sample of respondents suggested: “Concern about government surveillance in democratic countries is nearly as high as in non-democratic states with long legacies of pervasive state surveillance.” (PEN America 2015)

Further, two other research surveys from the past decade contextualise the findings of the UNESCO study in the US. In February 2015, the Pew Research Center released the results of a survey on “Perceptions of vulnerability and changes in behaviour” among members of the US-based organisation Investigative Reporters and Editors (IRE). Holcomb, Mitchell and Page (2015) found that 64% of investigative journalists surveyed believed that the US Government collected data about their communications. The figure rose to 71% among national political reporters and those who report foreign affairs and national security issues. Ninety percent of US investigative journalists who responded to the Pew survey believed that their ISP would routinely share their data with the NSA, while more than 70% reported that they had little confidence in the ability of ISPs to protect their data. As a result, 49% of respondents said that over the previous year (2014-2015) they had changed the way they stored and shared sensitive documents. Twenty-nine percent said they had changed the way that they communicated with journalists and other editors. Almost 45% of respondents to the Pew survey ranked surveillance as the number one or number two challenge facing journalists. (Holcomb, Mitchell & Page 2015) Nearly half of the national security, political and foreign affairs reporters among them also reported that concerns about surveillance had caused them to change the ways in which they communicated with sources (with reverting to face-to-face meetings being the main means of protecting sources). Meanwhile, 18 percent of this group reported that it was becoming harder to get sources to speak ‘off record’.

Another study by Human Rights Watch in 2014 (HRW 2014a) interviewed 46 senior national security

journalists from major US news organisations, revealing the steps being taken to keep communications, sources and other confidential information secure in light of surveillance revelations. That study concluded that in the US, the combination of increased surveillance and government prosecution of leaks was having a big effect on the news gathering practices of national security reporters and their news organisations. It found that: “Journalists are struggling harder than ever before to protect their sources, and sources are more reluctant to speak. This environment makes reporting both slower and less fruitful.” (HRW 2014a)

3.7.3 But is this not a ‘golden age’ for investigative journalism?

“Technology is allowing information to be leaked on a vast scale. ... For me as a journalist we’re in boom times, because you’re able to get information that’s incredibly detailed and you’re able to get stories that you couldn’t possibly [get before],” ICIJ’s Gerard Ryle told me in an interview for *Protecting Journalism Sources in the Digital Age*, declaring the digital era a “golden age for journalism,” despite the risks. (Posetti 2015f; 2017a p.104) Former Editor-in-Chief of Argentina’s *La Nacion*, Carlos Guyot, also acknowledged the significant benefits of Digital Era investigative reporting involving confidential sources, including access to leaked documents that would have been impossible to get even five or ten years ago, and the ease with which such data dumps can be transported on portable devices. “New technologies bring new challenges with them, but also new opportunities, like encrypted conversations via new software, although this must be combined with old fashioned practices. ...There is nothing like a face-to-face meeting with a source,” he said. (Posetti 2017a p.104)

However, one of the risks of this data boon is the rush to legislate against the impacts of leaks, according to Gerard Ryle. “The leaks are getting bigger, and therefore the law is scrambling to catch up...and that’s the danger for authorities, and for people who want secrecy, and I think that there is a push generally across the world to try and cope with this,” Ryle said. “[It’s] a problem for governments, agencies, any organisation that wants to keep secrets. It’s becoming more and more difficult to keep those secrets.” (Posetti 2018c) This helps explain the Obama administration’s unparalleled pursuit of leakers in the US, as noted by Kirtley (2014), in the post 9/11 US environment through attempts to force journalists to reveal the identities of their confidential sources “on the grounds that national security demands it.”⁷¹

3.7.4 Going back to analogue basics on the assumption “You’re being watched”

“We create vast tracts of data - from internet connection records to communications data – and this information can tell interested parties everything about a reporter, the story they’re pursuing, and the

⁷¹ See my discussion/interview with James Risen in Chapter 6.

source they're protecting," (Townend & Danbury 2017) current *Guardian* Editor-in-Chief Kath Viner observed in a 2017 report for the UK parliament on 21st century source protection risks. Such risks occur in a reporting environment where digital contact with sources is more likely than in-person contact, and where law enforcement agents are able to access journalists' data without the journalists or their sources ever knowing.

So, how do reporters protect their confidential communications with sources in the age of surveillance? Many of the journalists and editors interviewed for *Protecting Journalism Sources in the Digital Age* discussed their return to pre-digital methods of sensitive source communication as a defensive measure. "I'm more careful with any digital platform that I'm involved in—whether it's email, phone or any other digital format. I assume that [I am] probably being watched, listened to, or read. That's my starting point and I take it from there," Daoud Kuttub said. (Posetti 2017a p24) ICIJ's Gerard Ryle said he adopted the same mode. "Don't put things in writing, don't do certain things if you don't want them to come out afterwards. You have to assume that everything you do is being recorded or traced," he said. (Posetti 2017a)⁷²

UK QC Gavin Millar, who has advised *The Guardian*, reported telling his clients to revert to traditional methods of investigative journalism. "They actually have a contract phone and throw it into the Thames at the end of each week, they will meet sources in pubs, write notes, hide the notes...in distant places where people can't get them if their houses are searched by police, and some of them are very, very good at it," Millar said. (Posetti 2017a⁷³) Bolivia's Ricardo Aguilar said he avoided using digital communication in order to protect his sources. "Extreme distrust is the only defence against the possibility of a raking of secret sources in email accounts or social networks," he said. (Posetti 2017a) And *La Nacion*'s Carlos Guyot said his investigative journalists were spending a lot more time on the road – travelling significant distances to enable face-to-face meetings with sources. "...Our main investigative reporter drove for three hours to a different city for a 15 minutes conversation with a source and drove back to our newsroom. If we are willing to endure the challenges, we can still do good journalism." (Posetti 2017a) Meanwhile, Alan Rusbridger referenced 'brown envelopes' and 'dark carparks' as potential modes of secure source communication that might need to be reverted to if investigative journalism is able to be sustained in the Digital Age.

Three journalists interviewed for the UNESCO study mentioned the trend of relying on chat apps as a more secure form of source interaction than email, but Mexican journalism safety expert Javier Garza Ramos warned against such an approach. "If we're sloppy and we say everything we know about our sources on our WhatsApp, then of course the government is going to find out who our sources are, or

⁷² Note: This quote is taken from a pre-publication version of *Protecting Journalism Sources in the Digital Age* which was paraphrased during UNESCO's final edit.

⁷³ Note: This quote is taken from a pre-publication version of *Protecting Journalism Sources in the Digital Age* which was paraphrased during UNESCO's final edit.

whoever is spying on us,” he said. (Posetti 2017a p109) Garza Ramos’ subsequent research (2016) for the Center for International Media Assistance identified additional technological solutions being pursued by journalists seeking to make their digital communications with sources and potential sources more secure.

Former investigative journalist turned academic Paul Lashmar has published research that echoes my UNESCO study findings regarding the impact of source protection erosion on journalism practice. His qualitative interviews with a small sample of national security reporters (Lashmar 2017) revealed universal concern about the intelligence agencies’ greatly enhanced capability to track journalists and to “identify and neutralise” their sources: “...there is clear evidence of a paradigmatic shift in journalist–source relations as those interviewed regard Five Eyes mass surveillance as a most serious threat to the fourth estate model of journalism as practised in Western democratic countries.” (Lashmar p665)

One of the consequences of realising one is under constant surveillance as a journalist or researcher is a reluctance to report on the Five Eyes ‘project’ according to Ruby et al (2017 p.353), who have analysed research and reportage on mass surveillance to identify deterrents. This chilling effect was also demonstrated in Waters (2017) qualitative study focused on seven national security reporters’ digital security strategies for evading government surveillance. The study followed a ‘panopticism framework’ which states that those under real or perceived observation will alter their behavior to be more subservient to authority. Waters found that: “the way they work has changed under a real or perceived threat of mass government surveillance, making their work more difficult and potentially damaging their communications with sources.” (Waters 2017 p.1) Several prospective interviewees refused to participate in Waters’ research because of the risks. This was also a reluctance I experienced while undertaking interviews for both *Protecting Journalism Sources in the Digital Age* and this exegesis.

3.7.4 Taking responsibility for digital security

Recognising the role of encryption in the defence of journalism based on confidential sources, in 2015, the UN Special Rapporteur for the Promotion and Protection of the Right to Opinion and Freedom of Expression, Prof David Kaye, declared encryption an important tool to secure human rights as a range of States seek to limit the availability of encryption and ensure ‘backdoor access’ to encrypted data. (Kaye 2015a) As digital research, investigation and production methods become further entrenched and normalised in contemporary journalism practice, “computer security and privacy risks threaten free and independent journalism around the globe”. (McGregor et al 2016)

Through qualitative research focused on newsrooms, McGregor et al (2016) have identified “distinct—and sometimes conflicting computer security concerns and priorities of different stakeholder groups

within journalistic institutions, as well as unique issues in journalism compared to other types of organizations". (McGregor et al 2016 p.15) Bell and Owen's curation of research into journalism practice in the post Snowden era (2017) also revealed that many news organizations are woefully ill-prepared to protect their work and the identities of confidential sources from official snooping.

It is clear that it is no longer just investigative journalists and national security correspondents who need to deal with Digital Age threats to source protection. According to Rusbridger, the net is widening. For example: "It's become increasingly hard to report on the national health service because you know they all have confidentiality agreements, so if you're a health reporter you probably want to make sure that you begin to understand this stuff." (Posetti 2018c) This remains a particularly acute problem in regional newsrooms in the UK according to research from Bradshaw (2017) despite widespread reporting of police intercepting journalistic communications to identify sources:

Regional newspaper journalists show few signs of adapting source protection and information security practices to reflect new legal and technological threats, and there is widespread ignorance of what their employers are doing to protect networked systems of production. (Bradshaw 2017 p334)

Bradshaw contends that a 'reactive' approach to the crisis is no longer sufficient and that "publishers need to update their policies and practice to address ongoing change in the environment for journalists and sources." (Bradshaw 2017 p334) The other factor to consider is that seemingly innocuous local stories built on anonymous sources can turn into large-scale investigative journalism projects. From little stories big stories grow. But careless initial contact with a source makes such a person increasingly vulnerable as the story develops. Swedish public radio's Fredrik Laurin said journalists' skills are underdeveloped when it comes to protecting sources in the 'digital hemisphere'. "Very few journalists use encryption and know how to use it—it's not in their toolbox and that is a major problem," he said. (Posetti 2017 p.109)

And when you do come into contact with sources...you often get confronted with very important questions—how do you, in reality, protect this source? Are you going to store the information on the company server? How are we going to communicate? What level of encryption do you use? Serious questions. (Posetti 2017 p.109)

Laurin's hardcore dedication to digital security in the interests of protecting his sources could be viewed as extreme but it needs to be understood in the context of the Swedish legal source protection framework that actually criminalises unauthorised source revelation. "It's me, Fredrik who goes to prison if you are my source and I lose my notebook at the bar and your name comes out because of that. That's my fault and I go to prison. That's why I don't use...Facebook," he said. (Posetti 2017a

p.125⁷⁴) Laurin said he also banned his staff from using certain devices due to concerns about security vulnerabilities:

I need to survey—which I do, very thoroughly—who my suppliers are. I know exactly where my server is standing, I know exactly what the contract says, the hard discs in that server are named in my name, with my phone number. There’s a tag on the material that says this material is protected according to the Swedish constitution. (Posetti 2017a p.125)

According to Laurin, his team’s digital security expertise and caution gives them an edge in journalism based on confidential sources. Such an edge was demanded by both Edward Snowden and the Panama Papers’ source known as ‘John Doe’. (McGregor et al 2017)

However, digital security measures designed to protect sources can be unwieldy and time-consuming, and these factors remain a deterrent to many investigative journalists. ICIJ’s Gerard Ryle told me that he considers some colleagues unnecessarily paranoid: “When we were doing the Offshore Leaks project we started off by trying to encrypt a whole email communication with everyone we were working with, it became a complete nightmare, because, first of all not all of us are very technological, including myself, and it became a hindrance to communication,” Ryle said in a 2015 interview for *Protecting Journalism Sources in the Digital Age*. (Posetti 2017a)⁷⁵ However, a year later heavy encryption was the default requirement of ICIJ during the Panama Papers investigation which saw 400 journalists from 80 countries working collaboratively for 12 months to produce high-impact journalism that ultimately brought down a government. To participate in the project, all members were required by ICIJ to use two-factor authentication and encryption. Prior to the Panama Papers investigation, a survey of 118 ICIJ members found that 47% of journalists were mostly unaware of PGP encryption or two-factor authentication, and 45% had never used. (McGregor et al 2017) However, after the Panama Papers collaboration, which used a secure interactive platform known as the Global I-Hub, over 60% of surveyed journalists reported to researchers that the encryption requirements for the collaboration, which demanded all documents and messages (no matter how sensitive) be encrypted, were “easy” to use. (McGregor et al 2017 p.505)

The gender dimensions of source protection were also identified in the major artefact, which noted “The particularly acute impact on women journalists and sources when the privilege is undermined, due to gender factors involved in face-to-face meetings when online communication is compromised by surveillance as well as the gender-specific factors in online harassment.” (Posetti 2017a p134; See also Carter 2017; Micek & Nolasco 2018)

⁷⁴ See Thematic Study Two in *Protecting Journalism Sources in the Digital Age* pp 112-19.

⁷⁵ Note: This quote is taken from a pre-publication version of *Protecting Journalism Sources in the Digital Age* which was paraphrased during UNESCO’s final edit.

3.8 Journalists need training in digital security, but so do their sources

One of the emerging trends identified in *Protecting Journalism Sources in the Digital Age* was that journalists were beginning to train their sources in digital security to help them ensure their anonymity. *La Nación's* Carlos Guyot said: "If we want journalism to survive and flourish in the 21st century, there is no other option than give our reporters, and sources, the tools necessary to do their jobs." (Posetti 2017a p110) Former *Guardian* Editor Alan Rusbridger also acknowledged this challenge. "But because often sources are of interest to people with access to surveillance equipment, corporate or government, it feels like an unequal battle really." (Posetti 2017a p111⁷⁶) Executive Director of Arab Reporters for Investigative Journalism (ARIJ) Rana Sabbagh concurred that even the best training cannot keep up with global intelligence services: "...because even if you give them the best software and training, the intelligence agencies are always a step ahead. They are using the latest technologies to decrypt the content, they are using technologies coming from countries that are supposed to protect free speech like the US and Switzerland". (Posetti 2017a⁷⁷) Broadening awareness within the general community to the privacy risks posted by surveillance and data-retention/handover, along with the implications of national security overreach in reference to protecting confidential sources and whistleblowers can go some way towards strengthening defences. This is one of the reasons I emphasise the need to mainstream these discussions – through explanatory journalism and community events - to enable better grassroots protections against interference with journalistic communications.⁷⁸

3.8.1 Collaborating and outsourcing to protect sources

By 2015, International news organisations had begun expanding the use of secure drop boxes and collaborating on platforms designed to securely receive digital information from confidential sources. AfriLeaks, for example, is a Pan-African project that uses a highly secure mailbox designed to receive leaked documents, which connects investigative media houses to whistleblowers. It is operated by the African Network of Centers for Investigative Reporting. In Mexico, Mexicoleaks launched in 2015 with a similar mission. Sourcesûre and Balkanleaks are Francophone and Bulgarian websites that follow the same model, allowing whistleblowers to upload secret documents anonymously. Sourcesûre, which is based in Belgium, to take advantage of strong source protection laws there, was jointly established in February 2015 by France's *Le Monde*, and Belgian publications *La Libre Belgique*, *Le Soir de Bruxelles* and RTBF (Radio Télévision Belge Francophone). Yves Eudes, Sourcesûre's cofounder and a journalist at *Le Monde*, said that the cross-border, multi-platform collaboration between leading Francophone news

⁷⁶ As above.

⁷⁷ As above.

⁷⁸ See Chapters Five and Six.

organisations is a “spring of immunity” against coercion for journalists and their sources. “Unity is strength. This initiative could not have been launched by *Le Monde* or RTBF alone. Sourcesûre is underpinned by a whole spectrum of collaborators, from liberal to conservative media outlets, united by common journalistic values,” he said. (Posetti 2017 p112)

Ultimately, is it sustainable to promise confidentiality to sources in an era when it is so easy to identify a source without the involvement of the journalist, especially considering it can be a life or death matter? ARIJ’s Rana Sabbagh was clear in her response: “Even in the best and most democratic of countries, one can’t promise that anymore. There is no 100 percent guarantee.” (Posetti 2017a⁷⁹) The need to re-examine and update journalism ethics in reference to working with confidential sources and whistleblowers in the Digital Era (Posetti 2018a) is addressed later in this exegesis. It is also alluded to in the literature. Wasserman (2017) noted the “recent wave of prosecutions of disruptive sources in the United States suggests that confidentiality pledges—even buttressed by shield laws—may protect journalists, but do little to protect sources”. (Wasserman 2017 p72) However, the current Editor-in-Chief of *The Guardian* Kath Viner wrote in the forward to a UK parliamentary report published in 2017 that the Panama Papers collaboration proved that: “We still tell the same kinds of stories: scrutinising those in power; exposing wrongdoing; and working in the public interest. Our journalism continues to rely on an ability to offer protection and anonymity for sources and whistleblowers.” (Townend & Danbury 2017 p.3)

3.9 Summary and Conclusion

In this chapter, I have interwoven the essential arguments and most pertinent data from the major artefact with academic literature, and high level research from intergovernmental organisations, civil society groups and industry bodies in order to anchor *Protecting Journalism Sources in the Digital Age* within broader scholarship. This process has also enabled an augmentation of the data produced during my UNESCO research project, the research for which ceased in mid 2015, with scholarship and research that has emerged within the intervening years (i.e. up until the time of submitting this thesis in August 2018). This has allowed me to demonstrate that the trends that I identified in *Protecting Journalism Sources in the Digital Age* have in fact become more entrenched, and increasingly global in their manifestation. The impacts of these trends include:

- Increasing reliance by investigative journalists on encryption technology to defend communications with confidential sources from intrusion and interception, in parallel with reversion to analogue methods of contact where practicable;

⁷⁹ Note: This quote is taken from a pre-publication version of *Protecting Journalism Sources in the Digital Age* which was paraphrased during UNESCO’s final edit.

- Increasing collaboration on global investigative journalism projects involving the ‘outsourcing’ of source protection;
- An increasing sense of powerlessness against surveillance as the technology advances and the risks increase in parallel;
- Increasing attention on the issues from scholars researching at the intersection of journalism, technology and freedom of expression

However, from this overview of the emerging academic literature on the practical impacts of source protection erosion in the Digital Age, one clear gap that needs addressing in the scholarly research field is in the area of collaborative approaches to mitigation: between competing journalists and news organisations; between journalists and umbrella source ‘clearing houses’ like ICIJ; between journalists and civil society organisations and; between journalists and their sources. Another issue requiring exploration is the impact of these developments on confidential sources and whistleblowers themselves.

Chapter 4: Literature and Context B – the fraught history of UNESCO freedom of expression research publications

...information in all fields shall go unfettered. But we shall never cease to affirm that such freedom cannot be fully affirmed until it becomes a reality for everybody. UNESCO has devoted its efforts to bringing about such conditions ever since it was founded on the authority of its constitution which enjoins it to “work for the unrestricted pursuit of objective truth and the free exchange of ideas and knowledge”, and to that end, “to increase the means of communications between peoples”. (MacBride et al 1980 p14)

...researchers and authors trying to navigate the assessment and reporting of global trends in media development and freedom of expression under contract to the Organisation can, ironically, struggle with the impacts of ‘diplomacy’ within the UN system where the research intersects with politically sensitive issues (Reid & Posetti 2017)

In this chapter I will unpack the long and complex history of UN actors in freedom of expression-oriented diplomacy and advocacy. UNESCO – the United Nations’ Education, Scientific and Cultural Organisation – is ostensibly the only UN agency with a specific press freedom remit. UNESCO’s Freedom of Expression and Media Development Division does much valuable work, including leading the UN’s response to increasing threats to journalism safety, emphasising the propensity for journalists to be murdered with impunity. It is also responsible for World Press Freedom Day and issues the annual World Press Freedom Prize to journalists facing extreme duress.⁸⁰ In this work, it collaborates with civil society groups, academics, industry bodies, specialists within other intergovernmental organisations, and the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. However, historically, UNESCO has been particularly vulnerable to conflicts connected to freedom of expression research that it has commissioned, given the extreme geopolitical sensitivities surrounding the issues. Controversies dating back to the late 1970s triggered by the MacBride Commission and the so-called New World Information and Communication Order (NWICO) report of 1980 continue to echo in the halls of UNESCO’s Paris headquarters today⁸¹. Many of these disputes have their origins in differentiated philosophies between Western Member States and those of the Global South regarding the status and practice of journalism in society. These embedded tensions were exacerbated in the context of escalating sensitivities around mass surveillance and national security overreach, creating an

⁸⁰ See detail of the UN Plan of Action on the Safety of Journalists and the Issue of Impunity here: <https://en.unesco.org/un-plan-action-safety-journalists?language=en> See details of the World Press Freedom Prize here: <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/press-freedom/unesco-world-press-freedom-prize/about-world-press-freedom-prize/> And read about the International Day to End Impunity For Crimes Against Journalists here: <https://en.unesco.org/commemorations/endimpunity> [All accessed 31/8/18]

⁸¹ See detailed discussion later in this chapter.

increasingly fraught environment for the production of *Protecting Journalism Sources in the Digital Age* (Posetti 2017a) - a study sitting at the intersection of these highly contentious issues.

4.1 UNESCO freedom of expression research: Intent and purpose

United Nations actors, including UNESCO, have been much engaged in debate about the implications of the emerging Digital Age threats to legal and normative source protection frameworks. They have commissioned research, initiated inquiries and formulated resolutions relevant to the issues at the core of this study, namely the impacts of surveillance, national security/anti-terrorism legislation, data retention/handover, the role of third-party intermediaries, and shifts in entitlement to access protections connected to redefinitions of journalism. A number of UN Special Rapporteurs have also made interventions pertinent to the defence of journalistic source confidentiality, as threats posed by privacy erosion in the context of omniscient surveillance, along with national security overreach increased in the post-Snowden era.

Protecting Journalism Sources in the Digital Age (Posetti 2017a) was effectively mandated by the UNESCO Resolution on internet-related issues in November 2013 which stated that:

...Privacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law, and...such privacy should not be subject to arbitrary or unlawful interference... (UNESCO 2013)

And this mandate was reinforced via a UNESCO General Conference Resolution in November 2015 (UNESCO 2015e), carried after the major artefact was submitted to UNESCO for publication and a major excerpt had been published (UNESCO 2015b), but before it was published in full, which requested that UNESCO:

4.4 Recognise the role that anonymity and encryption can play as enablers of privacy protection and freedom of expression and facilitate dialogue on these issues.

6.2 Recognise the need for enhanced protection of the confidentiality of sources of journalism in the digital age;

The important role played by regulatory and normative frameworks in defending the defining journalistic principle of confidential source protection was the context for these UNESCO mandates.

The role of UN Organisations in defending freedom of expression rights connected to the practice of journalism has a long history under Article 19 of the UN Universal Declaration of Human Rights (UN GA

1948) and Article 19 of the International Covenant on Civil and Political Rights (UN GA 1966). But it wasn't until 2011 that the UN Human Rights Committee formally endorsed a form of journalistic privilege designed to protect journalists from having to divulge the identity of confidential sources, apart from in exceptional circumstances, and in accordance with the tests of necessity and proportionality. This occurred in the context of General Comment 34 issued by the Committee, which stated that, as parties to the International Covenant on Civil and Political Rights (ICCPR): "States...should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources." (UN HRC 2011)

I have mapped legal instruments and so called 'soft law' developments (e.g. resolutions, declarations, statements, comments, recommendations and reports) (Conde 2004 p.242) that constitute the regulatory and normative frameworks overseen by the United Nations from the period 2013-2018 in the appended 'impact timeline' (Appendix 1, 9.1). *Protecting Journalism Sources in the Digital Age* (Posetti 2017a) is situated within this timeline to provide context for its commissioning, development and impact. The timeline can also be seen as a demonstration of evidence of digital disruption and challenge to the international regulatory and normative frameworks that support press freedom (Joyce 2015), its corollary privacy, and the right to confidential communications between those doing journalism and their sources.

4.2 Realpolitik and the fraught history of UN involvement in freedom of expression issues

In spite of a long history of involvement in freedom of expression issues, the role of UN Organisations in defending rights connected to the practice of journalism has a fraught history - one encumbered by realpolitik. According to Brew (2015), this German term with its origins in mid 19th century political pragmatism, either represents the best approach to meaningful change and political stability in a world buffeted by uncertainty and rapid transformation, *or* it encapsulates an attitude of cynicism and cold calculation, a transparent and self-justifying policy exercised by dominant nations over weaker ones. (Brew 2015) In the context of research for the UN, it often means the need to balance the ideals of the subject matter (e.g. press freedom and transparency) against the demands of an intergovernmental organisation effectively beholden to Member States' competing, and sometimes irreconcilable, objectives and demands. It can also involve negotiating perceived imposts on freedom of expression with international bureaucrats, for whom the interests of diplomacy are paramount. These are the geopolitical realities of international communications research commissioned by UNESCO.

A recent (non)event at UN headquarters in New York effectively illustrated the complexity of the UN's press freedom mission, as anchored in the international legal and normative frameworks. The UN Alliance Of Civilizations (UN AOC) was due to host a panel discussion involving a number of high-profile

journalists on May 3rd, 2018, to mark World Press Freedom Day. But in an act of supreme irony, the UN AOC demanded politically motivated edits to a presentation from the keynote speaker, Alan C Miller – the Chief Executive of the News Literacy Project (*The New York Times* 2018). Miller’s presentation included video clips focused on the severe restrictions on press freedom in Egypt, Mexico and Turkey, while also referencing Russia and Pakistan. He said he was first told he must delete the references to Turkey, and then a UN AOC official told him that all of the clips would need to be dropped. After Miller refused, the UN AOC reportedly cancelled the event claiming that it was ‘postponed’ (UN AOC 2018). In response, Miller, posted about the incident on his organisation’s website to explain what he viewed as the censorious actions of UN AOC officials seeking to placate Turkey (a founding Member State of the UN AOC and the world’s leading jailer of journalists). (Miller 2018)

“I could not permit this censorship of our presentation due to the stated concern that it would offend one or more countries engaged in repression and violence against journalists,” Miller wrote (Miller 2018). Earlier in the day, the UN Secretary General Antonio Guterres issued a message for World Press Freedom Day declaring that: “A free press is essential for peace, justice and human rights for all. It is crucial to building transparent and democratic societies and keeping those in power accountable” (UN 2018b). Several of the journalists who were scheduled to appear on the UN AOC panel responded by publicly condemning the apparent UN-sponsored hypocrisy (*The New York Times* 2018).

UNESCO is the UN agency responsible for World Press Freedom Day⁸² and the International Day to End Impunity for Crimes Against Journalists⁸³. UNESCO’s Guy Berger has written that lessons learned about press freedom from World War II were incorporated into the Organization’s constitution, “...which perceived that to secure peace and end warmongering, societies needed a free flow of information.” (Berger 2013 p.132) Such a flow is an essential function of press freedom, the core principles of which found specific support within UN regulatory frameworks under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified in 1966 and coming into force a decade later. Specifically, Article 19.2 stipulates:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his (sic) choice. (ICCPR 1966)

Problematically, however, as indicated there is a history of issues and tensions within UN organisations connected to the commissioning and publication of research and policy papers pertaining to freedom of expression issues.

⁸² C.f. UNESCO (n.d.) <https://en.unesco.org/commemorations/worldpressfreedomday/2018%20%20> [Accessed 3/3/18]

⁸³ C.f UNESCO (n.d.) <https://en.unesco.org/commemorations/endimpunity> [Accessed 3/3/18]

4.2.1 Unpacking the history of UNESCO's communications research

As UNESCO has written about its own history of communications research, since the 1960s, there has been a substantial tradition of research commissioned by the Organisation “with topics ranging from rural radio and farm forums to satellites and Internet, and their application for educational media”. (UNESCO 2009 p219) The Organisation wrote a chapter called *UNESCO's Contributions for Cultural Diversity and Communications for Development* for Jan Servaes' (2008) book *Communications and Social Change*, which detailed its approach to research in the field in historical context. That book grew out of UNESCO-commissioned research titled *Approaches to Development: Studies on Communications for Development* (Servaes 2003), demonstrating a pattern of high-quality research produced by UNESCO, in collaboration with academics. According to UNESCO, its communications research brief involves monitoring the ‘information society’ as a whole, in collaboration with other organisations that have relevant mandates. While it acknowledges that sometimes its role is simply as a source of information or experts, “On other occasions it plays a more prominent role: in promoting South-North dialogue, in reinforcing communication capacity in the developing countries, or in monitoring a free flow of information.” (UNESCO 2008 p219)

Concerns about ‘protecting’ journalists – an issue bound up with debates around source confidentiality and journalism safety – are a recurring theme in UNESCO's research agenda. The issue first attracted the attention of the UN General Assembly in 1970, with a decision to develop an international agreement for “ensuring the protection of journalists engaged in dangerous missions”. (Chocarro Marcesse 2017 p45) In the case of the UNGA, tensions emerged between States over the categorisation, definition and (most problematically) registration of journalists in reference to the applicability of the ‘protection’ being considered, and the project was ultimately abandoned. (Chocarro Marcesse 2017 p48) However, these issues would echo through the decades⁸⁴, re-emerging dramatically within UNESCO in the late 1970s and early 1980s in the context of a major global communications research project, and finding resonance with the production, publication and research framework underpinning *Protecting Journalism Sources in the Digital Age*.⁸⁵

Much of UNESCO's work in this space has been anchored within the Organisation's International Programme for the Development of Communication (IPDC)^{86 87} and executed through the UN Plan of

⁸⁴ Note: Within UNESCO, parallel debates continued and in 1978 the need to protect journalists and media workers undertaking their duties found formal recognition in the ‘Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, apartheid and incitement to war’ Available here: http://portal.unesco.org/en/ev.php-URL_ID=13176&URL_DO=DO_TOPIC&URL_SECTION=201.html [Accessed 5/8/18].

⁸⁵ See discussion on the commissioning, production and publication of *Protecting Journalism Sources in the Digital Age* later in Chapter Six of this exegesis.

⁸⁶ I am co-editor and contributing author to the IPDC-commissioned book *Journalism, ‘Fake News’ and Disinformation* (2018)

⁸⁷ Dr Guy Berger is the current IPDC Chair. He is interviewed for this exegesis, having commissioned *Protecting Journalism Sources in the Digital Age*.

Action on the Safety of Journalists (UN 2012), initiated by the IPDC. The IPDC was established in 1980 to aid media capacity building in developing countries (Berger 2013) as debate raged between Member States about inequitable international communications flows. This followed publication of a highly controversial report produced by the so-called MacBride Commission (C.f. Nordenstreng 1984). The story of that Commission, and the incendiary global study it produced, provides useful context for my dissection (Chapter Six of this exegesis) of the politics and tensions entailed in the production and publication of *Protecting Journalism Sources in the Digital Age*.

4.2.2 The great New World Information and Communication Order debate

The International Commission for the Study of Communication Problems was established by UNESCO in 1977 in the context of a global debate about access to news, Western media companies' dominance of international news flows, and emerging communications technologies. The purpose of the Commission was to conduct research to help devise a new approach to these problems in the interests of advancing human development and peace (goals central to UNESCO's mission). The Commission was headed by Irish Nobel Laureate Sean MacBride and such was his influence, that it is frequently referred to as the MacBride Commission. The Commission was comprised of 15 members representing academia, industry and civil society organisations globally. The theoretical approach that emerged from this collaborative exercise became known as the New World Information and Communication Order (NWICO) and the major report produced was titled *Many Voices One World: Towards a new, more just and more efficient information and communication world order*. (MacBride et al 1980) It is most frequently referred to in the literature as the MacBride Report (Frau-Meigs 2013).

The then UNESCO Director General Amadou Mahtar-M'bow wrote the foreword to the 318-page research report:

...information in all fields shall go unfettered. But we shall never cease to affirm that such freedom cannot be fully affirmed until it becomes a reality for everybody. UNESCO has devoted its efforts to bringing about such conditions ever since it was founded on the authority of its constitution which enjoins it to "work for the unrestricted pursuit of objective truth and the free exchange of ideas and knowledge", and to that end, "to increase the means of communications between peoples". (MacBride et al 1980 p14)

However, the report – published at the height of the Cold War - became one of the most divisive publications in the history of UNESCO. A massive backlash developed, with roots in Western nations' objections to the report's support for an ongoing debate about the 'protection' of journalists and related approaches perceived as attacks on Western modes of media practice, independence and ethics.

The issue went to the heart of an ongoing argument between Member States over the licensing or registration of journalists. In the US and the UK (among several other non-Anglophone Western nations) the notion of licencing or registering journalists is considered antithetical to core press freedom values because it is a device often used by despots and dictators to muzzle the press – by controlling who can call themselves a journalist, work as a journalist, and what legal protections they can access (such devices are also often used to control what journalists are entitled to do/say/write). So, the concept of ascribing protections to journalists as a defined group was an incendiary idea in certain Western media and civil society organisations (particularly those based in the US). One of the early briefing papers published by the MacBride Commission was titled *World Communication Order 4: Protection of Journalists* (UNESCO 1979). It presented a range of recommendations, including four UNESCO-organised conferences on the theme, and it discussed the question of entitlement to ‘protection’ (entailing definitions of ‘journalist’).

But there were new issues triggered by the NWICO report connected to the so-called ‘right to communicate’ (McKenna 2013), involving concepts similarly antithetical (Nordenstreng 2013) to Western Member States’ press freedom ideals. In response, a group of US media interests gathered under the World Press Freedom Committee umbrella (one unfurled in the mid 1970s in response to a belief that UNESCO was seeking to control international information flows). (Bullen 2002) These fresh contentious issues included the linking of ethical criteria, and other obligations regarding content, to rights such as entitlement to ‘protection’. And while the over-arching MacBride report did not endorse such a system of ‘protection’, the fact that it left the door open to what was interpreted as a policy that eroded democratic notions of press freedom outraged several nations - the US and the UK key among them. (Nordenstreng 1999)

Then, in 1981, UNESCO convened a meeting in collaboration with the International Federation of Journalists, the International Organization of Journalists, and publishers’ representatives, to progress discussion on the journalism ‘protection’ question. (Nordenstreng 2016) The controversy escalated with several Western news organisations reporting that the push amounted to an attack on press freedom by UNESCO. (Nordenstreng 2011; Palmer 2013) In response, the World Press Freedom Committee (WPFC) managed to get 63 media organisations (representing 21 countries) to sign the Declaration of Talloires which rejected the concept of UN ‘protection’ and ‘special status’ pertaining to journalists. (Bullen 2002)

Next, the UK, and then the US, withdrew from UNESCO (and withheld funding for UNESCO programs) partly in reaction to the controversy. The UK did not re-join UNESCO until 1997 and the US remained out until 2003. (Nordenstreng 2012) Following the MacBride controversy, the concept of the New World Communication Order (NWICO) was abandoned by the UNESCO hierarchy, the MacBride report was buried (for years it was extremely difficult to source until it was republished in collaboration with an NGO), and debates about the protection of journalists were shelved until the late 1990s. (Galtung &

Vincent 1992 pp31-121) As Hackett (2013) has written:

...the UN buried the concept along with the report itself, given the ferocious and successful opposition of the US and UK governments and Western-based media conglomerates to NWICO. (Hackett 2013 p13)

These sensitivities resonate with debates analysed in *Protecting Journalism Sources in the Digital Age*, with the theme of entitlement to 'protection' in terms of accessing shield laws being central to my study.

After the end of the Cold War in 1989, the Organisation's General Conference set the objective "to render more operational the concern of the Organisation to ensure a free flow of information at international as well as national levels, and its wider and better-balanced dissemination, without any obstacle to the freedom of expression, and to strengthen communication capacities in the developing countries, so that they may participate more actively in the communication process" (UNESCO 2008). Within the framework 'Communication in the Service of Humanity', UNESCO committed itself to programmes that promoted and monitored the exercise of free expression, supported media pluralism and diversity, and emphasised professional and material exchange.

The research focus shifted again in 2001, following a meeting of experts at Leicester University who advocated for a "critical and qualitative research tradition" and "an interest in new development paradigms" in the context of a "compelling interest in UNESCO's policy research", according to UNESCO's own account. (UNESCO 2008 p.220) A decade ago, among its key research interests, UNESCO listed: 'infoethics' and universal access to information and knowledge; gender and ICTs; press freedom and freedom of expression in the information society; and education, particularly media literacy and training in and for the information society. (UNESCO 2008 p.221) UNESCO researches communications as a social process "...not merely as a technical imposition on society, an entertainment industry, means of advertising campaigns, nor as a mass media extension of the human voice or pen". (UNESCO 2008 p.230) According to the Organisation: "That is UNESCO's strength - most probably also one reason for the controversies into which [it] has on occasions been drawn." (UNESCO 2008 p.231)

4.3 The challenges of producing global research for UNESCO amid complex geopolitics

It is noteworthy that the US formally withdrew from UNESCO again in 2017, along with Israel, after halting its contribution of fees from 2011 in response to the Organisation's formal recognition of Palestine. The bill for US arrears was over US\$500m (Coningham 2017) by the time the country withdrew. The Organisation is in significant financial peril as a result, and that has a direct bearing on its ability to commission and adequately fund research, and its willingness to take risks.

UNESCO's current Director of Freedom of Expression and Media Development, Guy Berger, has (2013) written about the structural difficulties and constraints of commissioning and managing research projects within the Organisation. He commissioned *Protecting Journalism Sources in the Digital Age*, and he is responsible for the flagship UNESCO series *World Trends in Freedom of Expression and Media Development*. While the first edition of *World Trends* was still in production, he analysed the logistical difficulties involved in a global freedom of expression mapping exercise for a book on digital era journalism and citizenship. The first challenge he identified as: "...financial resources to pay for this exercise, in a context of severe budgetary constraints at UNESCO following the suspension of the USA's membership fee payments in the wake of the recognition of Palestine as a Member State of the Organization". (Berger 2013 p.140) The issue of funding constraints on the Division's commissions has also been raised by the IPDC and echoed by UNESCO's Communication and Information Commission. These constraints were certainly in evidence during the production of *Protecting Journalism Sources in the Digital Age* (which fed the second edition of *World Trends in Freedom of Expression and Media Development* in 2015 and the major *Keystones* report of the same year).⁸⁸

Secondly, Berger identified the *challenge* of inadequate 'knowledge resources', particularly as regards quality and equality of data sources:

Another issue has been a different kind of resources – the raw materials for the knowledge operation. It is very evident that data and information on these matters is very unevenly generated around the world, and its linguistic variation is also substantial. (Berger 2013 p.140)

He also noted the impacts of budgetary constraints on research in terms of UNESCO's internal resources: "One amelioration would have been the UNESCO Institute of Statistics to promote the collection of standard global data on media, but this has been put on hold due to budget cuts." (Berger 2013 p.140)

Further, Berger (2013) said that the issue of data accessibility and the lack of universal standards on data collection (including a lack of gender specific information) created problems for the project. "Even where basic facts are available...there is still often a problem about being able to work off secondary sources." (Berger 2013) This is also a point relevant to the impact of 'geopolitical realities' on the production of UNESCO commissioned and published research. Where secondary sources (e.g. international NGOs) are relied upon, there are political considerations as well as exceptionally high standards of verification. "It goes without saying that a document like this needed to be firmly fact-based, and that projections for future trends had to be based on a solid analysis of developments over the past five years," Berger wrote. (Berger 2013 p.140) Again, these were very substantial issues with

⁸⁸ Note: The total UNESCO funding allocation for the study was just US\$20,000.

Protecting Journalism Sources in the Digital Age, a project which required review of data covering a nine-year period, and one hampered by the absence of available data and a lack of transparency in many States.

The logistics of gathering expertise for a global research task as complex as the *World Trends* report were also problematic, according to Berger. Even though there was a budget to engage regional experts across a range of focal points (not the case with regard to *Protecting Journalism Sources in the Digital Age*), along with international topic experts in cross-cutting areas⁸⁹, “Identifying the researchers and their tracking down sufficient data has not been an easy task,” he acknowledged. (Berger 2013 p.140) This created further difficulties in the gathering, aggregation and synthesis of data to enable identification of solid patterns and trends across very diverse regions. “The research requires acknowledgement of many contradictory and partial developments,” adding to the complexity of the data analysis process. (Berger 2013 p.140) The much larger budget (compared with *Protecting Journalism Sources*) for this project enabled the gathering of the regional experts at UNESCO headquarters in Paris to assist with the process of collectively discerning trends from the draft reports but that was not a straightforward process either.

4.3.1 Negotiating global trends from the perspective of the Global South

Issues reflecting geopolitical realities were encountered during the research processes involved in the production of UNESCO’s *World Trends in Freedom of Expression* 2014 and 2015 reports, as well as during the production of *Protecting Journalism Sources in the Digital Age*, highlighting the need for an open discussion about the challenges of conducting such research involving Member States. I will critically reflect in detail on the challenges, stresses and tensions involved in the production of the major artefact later in this exegesis (Chapter 6), but it is worth noting here the findings of an award-winning paper (Reid & Posetti 2017) that I wrote with South African media studies academic Dr Julie Reid, one of the regional experts engaged by UNESCO to work on the 2013-2014 *World Trends* project. This paper, titled: *The caveats of studying trends in freedom of expression and media development globally, with a snapshot of Africa: a misunderstood continent*⁹⁰, was produced for a UNESCO-convened panel at the 2017 conference of the International Association of Media and Communications Research (IAMCR) on *Analyzing World Trends in Media Freedom and Development* in Cartagena, Colombia. UNESCO’s Guy Berger was the panel moderator⁹¹. The paper problematised the process of deriving ‘global trends’ applicable to the Global South from a dataset dominated by Global North experiences and

⁸⁹ Note: The editor of the report, Dr Courtney Radsch, then with UNESCO, recalls that the budget was not sufficient to pay researchers adequately. See Chapter Six.

⁹⁰ This paper was awarded ‘Best Paper’ by the International Communications Section of the International Association of Media and Communications Research (IAMCR) in 2017.

⁹¹ Note: Berger did not commission, nor collaborate on this paper, neither did he review it prior to delivery.

interpretations:

While the research contributions of global media trends reports, such as those produced by UNESCO, have value in providing evidence-based summaries of regional phenomena, such reporting mechanisms are not without their shortcomings. ... it is clear that while comprehensive data sets can be produced in developed contexts, such as Europe and North America, a lack of reliable, streamlined, continent-wide and up-to-date data sets in other regions result in knowledge gaps. These gaps, caused by factors such as a lack of transparency on the part of some States, and the underdevelopment of Internet access, present problems with regard to the synthesis and analysis of data and, consequently, they can result in incomplete snapshots of regions. (Reid & Posetti 2017)

The paper also challenged assumptions about the applicability to the Global South of normative values connected to press freedom and media production prevalent in the Global North.

Researchers ought to explore how to reconcile the fact that many of the commonly assumed normative values for media behaviour within democratic and/or Global North contexts cannot be assumed as universally applicable to all regions. (Reid & Posetti)

Thirdly, the paper noted the vexed nature of the geopolitical landscape and the sensitivity of many UNESCO Member States to identification and criticism in UNESCO publications mean that:

...researchers and authors trying to navigate the assessment and reporting of global trends in media development and freedom of expression under contract to the Organization can, ironically, struggle with the impacts of 'diplomacy' within the UN system, where the research intersects with politically sensitive issues. (Reid & Posetti 2017)

As the paper explained:

The combination of political and bureaucratic impediments can: cause delays in the completion of research and publication; increase workloads on research teams; create tension between UNESCO and research contractors; result in avoidance of naming States in official publications, or elimination from publication of reported experiences of citizens and other actors within States where State-based sources of data are not available to verify claims, or there is a limited number of alternative sources publicly available. (Reid & Posetti 2017)

These challenges include political sensitivities of individual Member States which, without proper context, may be perceived as being antithetical to the advancement of freedom of expression and

media development. Without clear explanation and guidance from UNESCO, such concerns could risk leading to self-censorship and other impacts.

Ultimately, there may be a requirement to remove certain details, such as the name of a sensitive country or a contentious quote, from a report in the interests of achieving publication. In turn, this process risks leading to conflict between researchers and the Organization or its representatives. This presents a tri-fold risk involving ethical challenges, 'frustration-fatigue' on the part of researchers [and possibly UNESCO staff dealing with researchers 'outside the tent'], and workloads that might far exceed the monetary value of the contract which limits the possibility of outsourcing work connected to research and review processes. (Reid & Posetti 2017)

A range of related issues was canvassed in two other academic papers based on research for UNESCO presented at IAMCR in 2017. One, by noted US media studies scholar Prof Monroe Price, focused on the *Political Economy of Preparing Global Reports for UNESCO* (Price 2017) and it was delivered at the same panel. Price, one of the lead researchers on the third edition of UNESCO's *World Trends in Freedom of Expression and Media Development 2017/2018* (UNESCO 2018d)⁹², discussed "challenges encountered, such as searching for comparable data across regions and over time". (Price 2017) He also noted that "Changed geopolitical alliances also affect trends and perceptions of trends, and international norms, themselves, can be in flux." (Price 2017) And he asked: "How do definitions of UNESCO's basic framework for reflecting press freedom, based on media freedom, independence, and pluralism, reflect various visions of the role of speech in society, and what tensions does that produce for the writing and diffusion of such a study?" (Price 2017)

Meanwhile, during another UNESCO IAMCR (2018) session arranged as a global consultation with media scholars on UNESCO's 'Internet Universality Indicators' project⁹³ (UNESCO 2018c) flowing from the umbrella 'Internet Study' under which *Protecting Sources* was conceived, Prof Gabriel Kaplún presented a paper titled *Media and internet indicators: social legitimacy and transformative capacity, Uruguay assessment* based on a research commission from UNESCO. "In Uruguay, between 2013 and 2015, we conducted a national study using the UNESCO Media Development Indicators. The process was very enriching for all the participants, but also very complex" (Kaplun 2017), Kaplun and his co-authors wrote. He analysed the processes based on a documentary review and testimonies of some of the participating actors, presented some of the learning outcomes, emphasising methodological and operational issues along with the potential and weaknesses of the project. During the presentation, he expressed the research group's frustration with UNESCO review processes and prolonged delays in

⁹² Note: Dr Julie Reid, co-author of the paper discussed in detail above was also contracted by UNESCO to work on *World Trends in Freedom of Expression and Media Development 2017/2018*

⁹³ Note: I was contracted to manage a small consultation phase of this project involving engagement with international journalists and journalism academics during the 2018 Perugia International Journalism Festival.

publishing the study, which was still forthcoming at the time of writing.

4.4 Conclusion and summary

I have argued in this chapter that the production of *Protecting Journalism Sources in the Digital Age* was undertaken in the context of a difficult and protracted history of conflict connected to UNESCO-commissioned research on freedom of expression issues. It is noteworthy that up until undertaking the detailed analysis presented in this chapter, I was unaware of the depth of historic UNESCO freedom of expression research controversies. Analysing this history has provided new insights into the tensions and boundary work required for the type of research this project involved. I will return to these issues in Chapter Six and propose recommendations for future research undertaken for intergovernmental organisations⁹⁴ in similarly contentious areas.

However, as my paper with Dr Julie Reid concluded, it is quite important to note that these challenges are by no means insurmountable, nor do they negate the purposefulness of embarking upon such research for UNESCO. The hurdles are navigable if:

... a process of open and transparent communication is adopted by UNESCO, acknowledging such potential obstacles and fostering trust between the parties; a collaborative approach to problem solving and work flowing from review processes is embraced by UNESCO officers and the researcher/s; there is acceptance that budgets and resources necessarily contain the scope of research; and if the concerns of researchers are taken seriously by UNESCO. (Reid & Posetti 2017)

It is also worth acknowledging that the high bar for information verification set by UNESCO encourages rigorous research standards. Similarly, despite the difficulties identified in this paper (and in this exegesis) in adequately mapping trends in freedom of expression and media development globally, UNESCO's insistence upon equitable regional representation in research scope, and gender balance within research teams and research subjects, positively mandates diversity in ways that few other organisations or funders require.

Finally, the mission of UNESCO freedom of expression research remains noble. As Berger (2013) noted: "The 2011 Resolution behind the research [*World Trends* 2014]...also included a clause that referred to reinforcing the need for UNESCO to promote the free flow of ideas by encouraging dialogue between Member States and by sensitizing governments, public institutions and civil society to strive towards

⁹⁴Note: my conversations over the past five years with researchers and authors engaged in projects for other intergovernmental organisations (e.g. Council of Europe) have indicated that the tensions described in this chapter are not unique to UNESCO research projects in the freedom of expression space.

freedom of expression and freedom of the press as a central element in building strong democracies....”
(Berger 2013 p.141)

Chapter 5: Literature & Context C - Applying the principles of advocacy journalism to freedom of expression research in a ‘networked press freedom’ era

“A robust and self-aware press speaks the language of publics, appreciates its public-making role, and eloquently articulates why it works to create some publics over others. This kind of press is one of democracy’s most powerful and essential institutions.” (Annany 2018)

“The term ‘media freedom’ in a more holistic sense certainly involves the notion of allowing journalists and editors to do their work freely and independently, but it also involves the freedom of the ordinary person to access and respond to that work. If the idea of media freedom is applied to media producers only, with no regard to the audience, then only a small part of the mass communications chain is being considered while what is in a digital world arguably the more crucial part, is being ignored. The entirety of the media chain does not only involve media producers, but includes the audience, so the notion of media freedom needs to be applied to the whole chain, not only part of it.” (Reid 2015)

In this chapter I will analyse the scholarship on alternative models of journalism and digital activism which helps explicate the hybrid model for negotiating freedom of expression rights in the networked public sphere, demonstrated by this PhD project. Theories and concepts considered include three broad clusters of scholarship. The first group of theories concerning activist, advocacy, development and peace journalism question the traditional separation of professional journalism practice from social change advocacy. Public, participatory and social journalism furthers this debate by breaching the separation of professional journalism from audiences. Finally, emerging digital political practices provide an understating of a networked public sphere which enables civic agency. The defence and public communication of freedom of expression rights demand a convergence of these modes and such a convergence is also implicated in what I am describing as ‘networked source protection’.

5.1 Extending the role of watchdog journalism: reconstructing professional norms to deal with a 21st century freedom of expression crisis

As Annany (2018) argues: “A robust and self-aware press speaks the language of publics, appreciates its public-making role, and eloquently articulates why it works to create some publics over others. This kind of press is one of democracy’s most powerful and essential institutions.” However, as Kovach and

Rosenstiel (2014), Schudson (2001) and others have observed, ongoing adherence to a misunderstood ideal of objectivity, anchored in 20th Century American journalism traditions, has hampered public interest journalism undertaken in pursuit of democratic ideals. Judith Lichtenberg's (1996) explanation of the role of objectivity in journalism is pertinent to accepting journalism's role in advocating for freedom of expression rights: "[An] objective investigator may start out neutral (more likely, she is simply good at keeping her prior beliefs from distorting her inquiry), but she does not necessarily end up neutral." (Lichtenberg 1996) In the case of reportage on the right of journalists to protect their confidential sources and defend legitimate journalistic practices and processes against intrusions frequently justified on national security grounds, such an understanding is essential. 'Watchdog journalism'⁹⁵ at times requires the lens to be turned inwards and the reflective practice conversation needs to be had in the public domain in the interests of maintaining open societies where the state, not the citizen, is rendered transparent.

Rosen (2003) has cast journalism as the "ghost of democracy in the media machine" but as Annany (2018) argues, "The press actually limits its authority and relevance when it tries to retain the illusion of independence." This problem is effectively illustrated in news coverage of climate change. As Boykoff and Boykoff's (2004; 2007) studies of reportage on climate change debates by the *New York Times*, the *Washington Post*, the *Los Angeles Times*, and the *Wall Street Journal* demonstrated, faux balance is often executed by news journalists, with the juxtaposition of widely accepted, peer reviewed science that establishes the legitimacy of climate change against the unproven and self-interested claims of big oil companies, conservative think tanks and industry organisations. Boykoff and Boykoff (2004) conclude that: "This bias, hidden behind the veil of journalistic balance," creates "both discursive and real political space for the U.S. government to shirk responsibility and delay action."

5.1.1 Material publics and an informed democracy

In this context, it is important to acknowledge that journalists can be the bridge to accessing 'material publics' & activating them. According to Marres (2012 p.31), 'material publics' are groups affected by issues but removed from the platforms that exist to address the issues. That is to say, they are "strangers who do not have at their disposal shared locations, vocabularies and habits for the resolution of common problems" Marres (2012 p. 46). As Annany (2018) explains it, "...the problem that material publics face is that they do not necessarily know what affects them and what is relevant to the conditions they share together—and they do not have control over the communication structures they would need to gain such knowledge" (Annany 2018). Annany also applies this theory to climate change reporting: "Even if you think you are unaffected by climate change (or do not believe it exists), its

⁹⁵ C.f. Hanusch, F and Uppal, C (2015) *Combining detached watchdog journalism with development ideals: An exploration of Fijian journalism culture* in International Communication Gazette Volume: 77 issue: 6, page(s): 557-576. Sage.

sociomateriality is inescapable. You are embedded in—and implicated by—relationships that make it a relevant public issue” (2018 p. 116). In expounding his theory of ‘networked press freedom’,⁹⁶ Annany argues that: “...issues stay dormant, invisible, and seemingly irrelevant until people recognize that humans and nonhumans—the social and the material—together make groups into publics” (2018 p. 136). Citing Meiklejohn (1948), he argues that the main purpose of the first amendment is to ensure that all citizens understand the issues critical to their daily life: “That is why no idea, no opinion, no doubt, no counterbelief, no belief, no relevant information may be kept from them” (Annany 2018 p. 136; Meiklejohn 1948 p. 89).

Dahl (1989) contends that democracy is based on an informed citizenry (Dahl, 1989 p.93) and Schudson (2015) has written about the need for both journalism and informed citizens to hold the powerful to account. “Without access to information we cannot be informed, and a society without informed citizens cannot be called a democracy. In modern democracies, the people hold government accountable not just on election day but continuously” (Schudson, 2015 p. 25). Going further, Keane’s (2009) model of monitory democracy requires informed citizenry to become agents for transparent, accountable governance in open societies. In the 21st century, that requires citizens to be informed on issues in the public interest even if they don’t find popularity with audiences, such as climate change, privacy and surveillance, and related press freedom issues. And monitory democracy is dependent upon a networked form of press freedom that defends confidentiality of communications involving those seeking to share verifiable information in the public interest. As Schudson argues: “If assembly democracy is linked to the spoken word and representative democracy to print culture, today’s democracy - what Keane calls ‘monitory democracy’ – emerges with the rise of multimedia society” (2015 p. 234).

5.1.2 Journalism protections and safety, and an informed democracy

This means that the press needs to explicate issues in the public interest. In the context of serious threats to the democratic system upheld in part by the pillar of press freedom, they need to advocate for protections that enable public engagement, agency and interactivity with freedom of expression rights - even if they’re oblivious to the potential impacts of their erosion. “The very best and most self-reflective journalists do not shy away from seeing their work as part of democratic culture and respond maturely to critical and constructive critiques” (Annany 2018). Such recognition is an historically rooted journalism norm, according to Annany: “They may not have said so explicitly, or they may have fallen back on tropes of their own, but embedded in the profession of journalism and the missions of many publishers were ideas about how they thought they were helping democracies, what they defined as the public interest, how they knew they needed to act if they were to be anything other than just another business” (2018).

⁹⁶ Note: See analysis of this theory later in the literature review

Similar issues emerge in the reportage of mass surveillance, national security overreach, data retention policies and their implications for confidential sources and whistleblowers, along with the public interest journalism that depends on them. Arguably, the urgency of this crisis for journalism and democracy demands an advocacy journalism approach to telling these stories. However, journalists typically retreat to norms that eschew industry ‘belly-gazing’ (i.e. reportage on issues central to journalism or about journalism practice) in mainstream media publications targeting broad audiences. This is often based on misconceptions about the role of journalism in press freedom advocacy, and perceptions that audiences are not interested in issues that threaten independent public interest journalism.

Parallels can be drawn with the issue of journalism safety and impunity for the killers of journalists. Between 2012-2016, 530 journalists were killed for their work, and in 90% of cases the killers were not prosecuted, according to peer reviewed research conducted by UNESCO (2018). As Pukallus and Harrison (2015) noted, “The changing nature of international war and conflict, where journalists have themselves become targets, and the rising death toll combined with the issue of impunity is making journalism safety a major international policy concern” (Pukallus & Harrison 2015 pp 63-8). UNESCO leads the UN’s work in this space, developing and anchoring the ‘UN Plan of Action on the Safety of Journalists and the Issue of Impunity’. The Plan includes several action points connected to research and awareness raising: “To whatever extent possible, the public must be made aware of these challenges in the public and private spheres and the consequences from a failure to act” (UN 2012). In implementing the plan, following extensive consultation, UNESCO has acknowledged that “Efforts to sensitize the public as well as relevant stakeholders to the societal importance of professional journalism is key in the achievement of the UN Plan” (UNESCO 2014b).

UNESCO’s Guy Berger has called on editors and journalists to report more on the problem of impunity for crimes against journalists but “Some say they don’t want to give journalists special treatment – to pay more attention to journalists than regular people” (Posetti, 2014). He summarised the objections he hears to covering the issues thus:

- *Journalists aren’t special, and shouldn’t be singled out*
- *It would come across as self-serving*
- *It will compromise our independence*
- *Media should tell the story, not be the story*
- *We can’t artificially skew the news*
- *There aren’t journalists killed in our country*
- *The public aren’t interested*

Evidence of the need for broader public engagement and activism on press freedom issues has been highlighted through a growing body of academic research on journalism safety including that from Saldaña and Mourão (2018) who note that: “Despite two decades of media liberalization, crime and

corruption, state violence against the press, and the lack of a free-speech culture cut across all layers, posing severe constraints to investigative reporting in Latin America.” Pukallus and Harrison⁹⁷ (2015) have published preliminary research findings from a global study of the attitudes of editors and audiences towards the issue of the murder of journalists with impunity. A key observation from their research is this: “...the public may be uninformed about the scale of attacks on journalists, but that doesn't mean they're not interested” (Pukallus & Harrison 2015). In fact, their analysis of qualitative focus-group conversations involving 39 audience participants from the UK found:

When our researchers revealed the actual numbers – how many journalists have been killed and how many go un-investigated – the numbers were met with disbelief and curiosity. The participants recognised and acknowledged their lack of knowledge, but at the same time wanted to know more. (Pukallus & Harrison 2015)

5.1.3 The surveillance state and an informed democracy

The citizens’ ‘right to know’ (C.f. Brooke, 2006) is paramount in the case of mass surveillance, privacy breaches and the implications of source confidentiality erosion for open societies. This was, of course, one of Edward Snowden’s primary motivations in becoming a confidential source for journalists who initially broke the ‘Snowden Files’ stories (before he exposed his own identity). The role of accountability journalism at a time when States have unparalleled powers to interfere with the ‘right to know’ necessarily involves overcoming barriers to reporting on issues considered too ‘inside the beltway’ for the attention of mainstream journalism. This is because, as Quill (2014) contends, the State can now meet its desire to ‘know’ “with the means to collect, monitor, and (even) predict the behaviours of their subjects/citizens” (Quill 2014) in an unprecedented manner.

Weber’s (1946) ‘paranoid institutions’ are now on a permanent war footing – ‘the war on terror’ – justifying omniscient surveillance and the parallel need for scrutiny and counter offensives involving activist, accountability modes of journalism.⁹⁸ Weber characterised the political culture of government institutions as insecure, paranoid and competitive with the central aim of protecting themselves at all costs. “Bureaucratic administration always tends to be an administration of the 'secret session'; in so far as it can, it hides its knowledge and action from criticism,” (Weber 1946 p. 233) he wrote. In wartime, layers of lies and secrets accompany the ‘official’ version of events, according to Weber. But that ‘wartime’ environment is now perpetual in the context of national security and anti-terrorism overreach, highlighting the need for vigilant accountability journalism applied to the very normative and regulatory frameworks that support the practice of journalism in open societies, in the broader public

⁹⁷ Note: Jackie Harrison is the first UNESCO Chair in Media Freedom, Journalism Safety and the Issue of Impunity (appointed 2018). She also leads the Journalism Safety Research Network (established 2016 by the University of Sheffield’s Centre for Freedom of the Media)

⁹⁸ See expanded discussion on alternative modes of journalism below

interest.

Fundamental to ensuring the public's 'right to know' about the overreach of the Surveillance State is investigative journalism dependent upon confidential sources – including journalism that reveals the machinations of security agencies and the extent of their unscrutinised reach into private conversations and activities in the name of 'national security' and 'anti-terrorism' measures. As academic and investigative journalist Prof. Heather Brooke has written: "If we are to be an informed citizenry – a prerequisite in a democracy – we need the agencies to avow their most intrusive un-targeted surveillance practices. Otherwise, they do not have a public mandate for them. In effect, they are acting outside the democratic system" (Brooke 2015). Richards summarises the top two threats of unchecked surveillance of citizens as a) the chilling of human thought and b) the abuse of power that results (Richards 2013). Richards also notes the flow-on effects of technological advances making mass surveillance operations both easier and cheaper for states and corporations, thereby increasing the ability "to blackmail, selectively prosecute, coerce, persuade, and sort individuals" (Richards 2013 p. 1961). Finally, he notes that the far-reaching potential consequences of unchecked surveillance can aid targeted killing, concentration camps and internment (Richards 2013 p. 1957). These are issues central to the purpose and exercise of freedom of expression rights and the parallel right to privacy – especially for journalists seeking to fulfil the role of 'watchdog' reporter but also for citizens more broadly. And the 'checking mechanism' of journalism is paramount in liberal democracies under threat. As Cohen argues, a society that allows "the unchecked ascendancy of surveillance infrastructures cannot hope to remain a liberal democracy" (Cohen 2013).

Penney (2016) established the 'chilling effect' of unrestrained mass surveillance on the right to access information through a study of Wikipedia traffic involving 'sensitive' pages connected to terrorism themes following the Snowden revelations detailing the monitoring and trawling activities of the NSA and PRISM⁹⁹. His research found "...not only a statistically significant immediate decline in traffic for these Wikipedia articles after June 2013, but also a change in the overall secular trend in the view count traffic, suggesting not only immediate but also long-term chilling effects resulting from the NSA/PRISM online surveillance revelations." (Penney 2016 p. 117) The result of such deterrence in connection with citizens' research on matters of security policy pertaining to terrorism would be an inevitable decline in the level of 'informed' debate and "our broader processes of democratic deliberation will be weakened," according to Penney (2017). As the Global Principles on National Security and the Right to Information asserted: "legitimate national security interests are, in practice, best protected when the public is well informed about the State's activities, including those undertaken to protect national security" (Open Society Foundations 2013). These principles (also known as the Tshwane Principles) were drafted in partnership with five international academic centres, the relevant UN Special

⁹⁹ PRISM is an NSA surveillance programme. C.f. <https://www.theverge.com/2013/7/17/4517480/nsa-spying-prism-surveillance-cheat-sheet> [Accessed 31/8/18]

Rapporteurs and a suite of civil society organisations.

As Russell (2016) contends, in the 21st century:

Corporate battles and guerrilla wars are fought on Twitter. Facebook is the new Berlin, home to tinkers, tailors, spies and terrorist recruiters. [But] Journalism remains one of the main sites of communication power, an expanded space where citizens, protesters, PR professionals, tech developers and hackers can directly shape the news. (Russell 2016)

Journalism has a critical – and to date under-fulfilled - role to play in educating the public about the threats of privacy erosion, mass surveillance and national security overreach to investigative journalism specifically. As Brooke wrote in her 2011 book *The Revolution Will Be Digitised: Dispatches from the Information War*:

In the digital age we have the technological tools for a new type of democracy, but the same technology can also be used for a new type of totalitarianism. What happens in the next ten years is going to define the future of democracy for the next century and beyond (Brooke 2011)

Her critique of journalists' approach to covering complex issues connected to the sustainability of open societies is also salient: "Journalists have an important role in representing and expanding the rights of the public, but...too few take this responsibility seriously. They are the final check on state power, but too often the noble goals of public enlightenment are forsaken for an easy story." (Brooke 2016)

5.2 How could journalism respond?

Richards (2013) provides an instructive framework for checking surveillance law that could be applied to journalism in its function as a scrutineer of public policy. It involves:

- An awareness that surveillance transcends the public/private divide and that much surveillance is outsourced to corporations.
- Recognition that secret surveillance is illegitimate: In a democratic society, the people, and not the state apparatus, are sovereign.
- Recognition that total surveillance is illegitimate.
- Recognition that surveillance is harmful

These principles could be applied to reporting the issues in conjunction with the 11-point model I developed for assessing the efficacy of source protection framework's for *Protecting Journalism Sources in the Digital Age*. Key indicators relevant to journalism on these themes drawn from that framework

are:

- *Recognise the value to the public interest of source protection, with its legal foundation in the right to freedom of expression (including press freedom), and to privacy. These protections should also be embedded within a country's constitution and/or national law*
- *Recognise that source protection should extend to all acts of journalism and across all platforms, services and mediums (of data storage and publication), and that it includes digital data and meta-data*
- *Recognise the potential detrimental impact on public interest journalism, and on society, of source-related information being caught up in bulk data recording, tracking, storage and collection*
- *Shield acts of journalism from targeted surveillance, data retention and handover of material connected to confidential sources (Posetti 2017a 132-3)*

Additionally, the following recommendations for journalists and other media actors from *Protecting Journalism Sources in the Digital Age* are highly relevant pointers for undertaking journalism designed to better inform publics about the issues:

- *Engage with digital issues impacting on source confidentiality protection, and actively campaign for laws and rules that provide adequate protection*
- *Explain to the public what is at stake in the protection of source confidentiality, especially in the Digital Age*
- *Ensure that sources are aware of the digital era threats to confidentiality*
- *Help audiences become more secure in their own communications, for example explaining how encryption works, and why it is important not to have communications security compromised (Posetti 2017a p.138)*

5.2.1 The secrecy beat: telling stories of the surveillance state

Gup (2008) recommended adding a secrecy beat to newsroom agendas to achieve similar goals: “If nothing else, it would produce some remarkable stories, and it might just help the public grasp the wider implications of unchecked secrecy” (Gup 2008 p. 26). The escalation of Digital Age structural changes impacting on newsroom budgets and resources internationally notwithstanding (Posetti 2018d), this would be a good way of embedding coverage of these pertinent, under-reported issues in newsroom contexts.

Brooke’s (2016) approach to reporting on Freedom of Information issues is also instructive, and similar

to my own in reference to source confidentiality and working with whistleblowers:

In the first year of FOI, I wrote many explanatory articles about the law with the aim of educating various audiences. For people to exercise their right to access information they must first understand they have such a right. This is what academics call 'citizenship literacy'. Therefore, for a right to be effective people have to know of its existence and how to use it. As such, public awareness was an important aspect of my work. (Brooke 2016)

As illustrated in the 'impact timeline' appended to this exegesis, I also produced journalism about my research as a feature of the 'Participative Action Research' model adopted for *Protecting Journalism Sources in the Digital Age*. This frequently involved the practice of making 'content out of process' with a view to educating and activating niche audiences in parallel. The explanatory role of journalism in regard to public education cannot be underestimated. Critical to its success is defining terms. As DaCosta writes "If you can't name and describe an injustice, then you will have an extremely difficult time fighting it" (DaCosta 2018). Journalists are professionally adept at such functions. They can play a vital role in communicating the risks as a shared social experience, while also educating and informing.

A growing number of think tanks, regulators and journalists are grappling with the question of how to best regulate big tech. But we won't fix it with better public policy alone. We also need better language. We need new metaphors, new discourse, a new set of symbols to illustrate how these companies are rewiring our world, and how we as a democracy can respond. (DaCosta 2018)

Stories about people's lived experience of these complex issues are also effective interventions¹⁰⁰ because they illustrate the real impact of policy and political systems on everyday lives. Pukallus and Harrison's (2015) research has identified the empathy engendered among audiences for the stories of journalists killed in the line of their work, along with associated interest in the broader social impacts of their targeting (Pukallus & Harrison 2015). Other relevant scholarship comes from Bartzen-Culver (2014) who examined an act of activist newspaper journalism pertaining to citizens' access to broadband internet in Wisconsin (US) as an enabler for active digital citizenship in areas like education and healthcare. She noted that the case demonstrated the role of newspapers in supporting the information needs of communities:

Newspapers do not merely serve as information providers, but also play a role as advocates within the public sphere. They define important issues facing communities and advocate for the best means to address those issues. In so doing,

¹⁰⁰ See also Prof David Kaye's contribution on this theme in Chapter Six

they adhere to social responsibility principles and fulfil part of journalism's ethical role within democracy. (Bartzen-Culver 2014)

This role is increasingly being played by the press in reference to the function of the platforms in democracies (as enablers and as threats to the sustainability of democracy). Debates about platforms and their disruptive power (and capacity to jackhammer democracy's foundation) are increasingly intertwined with press freedom discussions. The function of the platforms and chat apps (e.g. Facebook, Twitter, Instagram, WhatsApp) in democracies and open societies is an area ripe for activist journalism practice in reference to freedom of expression, access to information, disinformation, digital safety, source protection erosion and privacy. As Annany has observed in the aftermath of the Cambridge Analytica scandal (C.f. Persily 2017): "Securing the press's freedom to report safely and reliably became a shared concern because news organizations and social media platforms had become tightly intertwined" (Annany 2018). Annany further posits that news organisations could argue that: "social network sites should provide greater security for sources' identities; keep some data private while making other information easily visible; respect shield laws and reporter privileges in site terms of service" (Annany 2018). However, while social journalism offers very significant opportunities to build communities of interest around explanatory content in this space, too many news organisations are still fixated on "mitigating the risks of their staff misusing social media, their audiences misunderstanding social media activity, and their ideals of objectivity and impartiality become subsumed by social media relationships." (Annany 2018)

Nevertheless, there is some evidence of emerging activism in the context of the platforms' undermining of press freedom objectives. For example, the editor of Norway's *Aftenposten*, Espen Egel Hansen, took on Facebook through his newspaper in 2016 after the social media behemoth censored the famous Vietnam War photograph of Kim Phuc (i.e. Nick Ut's 'Napalm Girl'). This story illustrated what Ibrahim (2017) described as Facebook asserting its 'technological gaze': "where its system of managing content can turn the sacred into puerile and the puerile into popular entertainment, flattening, and re-mapping content through its own moral sensibilities" (Ibrahim 2017). It also goes to the 'boundary work' identified by Johnson and Kelling involving journalists' attempts to call Facebook to account as a news publisher (Johnson and Kelling 2017 pp 817-33). This episode demonstrates journalism's important role in educating the public and 'big tech' (in parallel) about the responsibilities and functions of the platforms in a 'networked press freedom' environment. As Annany contends:

...companies like Facebook and Google increasingly capture and monopolize revenue and attention [and] they consolidate the power to make publics within inscrutable and unaccountable sociotechnical systems, seeing public outcries as public relations problems to be ameliorated or endured. Such companies are not simply threats to the journalistic freedom, but to the very idea of autonomous, self-

governing publics... technology companies are generally not as adept as the news industry is at talking about publics and democracy. (Annay 2018)

Brooke's (2016) responses to the problem of building awareness within journalism about threats to freedom of expression (in her context focused on access to information) also included running training courses on Freedom of Information procedures for journalists via the UK's National Union of Journalists. That's something I, too, have done internationally (from 2014-2018), as a response to source protection erosion and digital safety threats, drawing on my research, along with consulting to news organisations, and collaborations with the Australian journalists' union MEAA on related policies. Specifically, I developed and rolled out a program of Digital Age source protection education for Fairfax Media (publisher of the *Sydney Morning Herald*, *The Age*, the *Australian Financial Review* et al) in Australia while I occupied the role of Head of Digital Editorial Capability (2016-2017).

5.2.2 Truth, ethics and trust

Truth, ethics and trust are interdependent in contemporary journalism's struggle for sustainability (Ireton 2018). The networked public sphere (Friedland et al 2006) and the 'rise of the audience' are central, and these structural shifts will be analysed with reference to the implications for communicating freedom of expression issues in the next section of this literature review. But the associated ethical imperative is relevant to the question addressed in this section: 'Why and how should journalism respond?'. Ward (2014) has called for 'radical media ethics' suitable for the digital era:

The digital media revolution has created a revolution in journalism ethics. Established principles are under scrutiny, new practices emerge, and a previous professional consensus on the aims and principles of responsible journalism has been shattered. Journalism ethics has to be re-invented for a global, digital media.
(Ward 2014)

Central to this reinvention should be activist journalism principles applied to reportage of press freedom erosions in the digital era, including attacks on source protection, and the digital safety and security of journalism and those doing journalism. "The guiding idea is that we need serious and systematic responses to the situation of journalism ethics today, and such changes should be radical - not piecemeal or conservative" (Ward 2014).

Relevant to this proposed reinvention of ethics for the digital era is the question posed by Hackett (2013) "What kind of journalism does democracy need?" He argues that a journalism that advocates for universal 'communication rights' is essential because of the failure of contemporary journalism in

Western liberal democratic contexts to meet expectations of ‘watchdog’, public sphere, community-building and communicative equality criteria:

...practices and concept of press freedom need to be expanded and supplemented by a broader understanding and implementation of communication rights, entailing legal and cultural forms that support the full participation of all segments of society. Such a paradigm is especially appropriate for postcolonial countries dealing with issues of economic development and inter-ethnic conflict. (Hackett 2013)

According to Hackett, a Communication Rights¹⁰¹ agenda is intended to overcome barriers to listening—such as prejudice, hate and discrimination and to foster a social, cultural, legal and political environment favouring the production and sharing of social knowledge; a sense of community; and human rights outside the communicative domain (Hackett 2013). Integral to such an approach should be activism about rights, including the right to privacy, as they interact with freedom of expression rights, such as the ‘right to know’. And bound up with these rights is, of course, the right to protect confidential sources and secure communications with whistleblowers (CRIS Campaign 2005). Allern points out that such objectives are not antithetical to the core values of contemporary journalism: “The notion of journalism as a mission, a task for the benefit of society has become a central part in the ideology of journalism.” (Allern 2002)

5.2.3 Recognising journalism’s role in social movements and social change communications

Journalists practicing radical democracy may be the kind of journalists that open societies under siege from rising fascism and the erosion of fundamental human rights need (Downing et al 2001 p. 43-4). In this context, what kind of journalism should a journalist operating as a radical democrat practice? Hackett (2013 p 13) describes radical democrats as fulfilling ‘watchdog’ and ‘public sphere’ functions, while also enabling ‘horizontal communication’ between ‘subordinate groups’ (Hackett & 2006), counteracting power inequalities found in other social order spheres (McChesney 1999). He notes that by:

*...giving public voice to civil society, media can facilitate needed social change, power diffusion and popular mobilisation against social injustices [while]...
Expanding the scope of public awareness and political choice by reporting events*

¹⁰¹ Note: the ‘Communication Rights in the Information Society’ campaign proclaimed in 2005: “Press freedom is deepened and expanded, to include or facilitate such desiderata as access to relevant public, government and corporate information; genuine diversity as well as plurality of media organisations and content; balanced ‘intellectual property’ regimes that do not unduly restrict users’ rights; and universal access to public media.” C.f. CRIS [Communication Rights in the Information Society] Campaign (2005). *Assessing communication rights: A handbook*. London: CRIS: www.centreforcommunicationrights.org/resources/tools/21 CRIS Campaign [Accessed 8/8/18]

and voices which are socially important but outside, or even opposed to, the agendas of elites. (Hackett 2013)

Such themes include the impacts of surveillance and privacy erosion explained in the context of ordinary citizens' lived experience and the potential consequences as they might affect them. "Unless communication and information are biased toward equality, they tend to enhance social inequality," as McChesney (1999) asserts.

Hackett (2013) argues for the supplementation of press freedom objectives with a more expansive notion of 'communication rights' because:

A press that is free from control by a self-serving State apparatus is fundamental. It is a chief means of holding governments and power-holders accountable, exposing and preventing corruption (one of the chief barriers to genuine social development), enabling a society to identify and address problems and to discuss and find its own path to development, engaging and developing people's capacity for democratic citizenship and helping people to feel that they have a voice in determining their country's future, and thereby an obligation to participate in building it. (Hackett 2013)

He conceptualises such a model – enriched by 'communications rights' objectives, a public sphere ethos, and radical egalitarian models of democracy - as a 'communicative democracy', in which "every cultural, ethnic and political sector can circulate ideas and information that potentially reach every other sector of society" (Hackett 2013).

Such media reform agendas can be considered as features of broader social movements, as Napoli contends (Napoli 2007 p. 21). Social movement theory has been used to analyse media reform campaigns such as the Communication Rights in the Information Society campaign (CRIS), studied by Thomas (2006). Figueroa et al (2002) outlined an integrated model for assessing Communications for Social Change (CSFC) more broadly:

The model...describes an iterative process where 'community dialogue' and 'collective action' work together to produce social change in a community that improves the health and welfare of all of its members. (Figueroa et al 2002)

This model draws on inclusive interpretations of 'development journalism' theory along with the network/convergence theories of communications. "For social change, a model of communication is required that is cyclical, relational and leads to an outcome of mutual change rather than one-sided, individual change." (Figueroa et al 2002) Re-examined in combination with Public Journalism theory, updated for the interactive social media era, Communications for Social Change provides part of the

underpinning for the hybrid model for negotiating freedom of expression in public that sits at the core of this PhD project.¹⁰².

5.3 Rebooting alternative media models in an era of unprecedented structural change

In reassessing media freedom concepts from a Global South perspective¹⁰³, South African academic Julie Reid (2017) has described the ‘digital revolution’ as unprecedented in the history of human mass communication:

The way in which people all over the globe now interact with one another, speak, learn and respond, in real time, has changed remarkably and it has done so in a remarkably short space of time. The introduction and widespread adoption of radio and television was, to communications history, like landing on the moon. The digital revolution of the internet (most especially including social media) was like leaving the galaxy on the Starship Enterprise at warp speed. (Reid 2017)

The implications for the revolution for journalism continue to be profound. The Digital Age has been described as a ‘golden era for journalism’ (Ryle in Posetti 2017a) by the Executive Director of the International Consortium of Investigative Journalists. Indeed, it has enabled access to significant data caches leading to ground-breaking investigative journalism (Obermayer & Obermaier 2016), new models of cross-border collaborative reporting, and access to treasure troves of knowledge and diverse sources at a mouse-click. It has also delivered unprecedented, ongoing challenges and structural changes to the news industry. Journalism in 2018 is facing a virtual ‘perfect storm’¹⁰⁴ of convergent pressures. This media era, where the only constant is change, has been described as a “state of permanent novelty” or “habitus of the new” (Papacharissi & Easton 2013).

The decade from 2000 shook much of the media world, according to Kleis Nielsen (2012), disrupting patterns and processes of news funding, creation, distribution, and consumption as the Digital Age took hold. It presented unprecedented opportunities and challenges in tandem. The digital transformation of the news industry and the craft of journalism is now understood as a perpetual process that is driven concurrently by the collapse of traditional business models, mass layoffs, changing audience behaviours

¹⁰² This discussion will be picked up later in the literature review

¹⁰³ See discussion of Reid’s theory of a more audience-centred approach to media freedom later in this literature review

¹⁰⁴ C.f. the video recording of a panel discussion titled ‘Journalism’s Perfect Storm?’ at the 2018 International Journalism Festival in Italy convened by me: <https://www.journalismfestival.com/programme/2018/journalisms-perfect-storm-confronting-rising-global-threats-from-fake-news-to-censorship-surveillance-and-the-killing-of-journalists-with-impunity> [Accessed 18/7/18]

(e.g. peer-to-peer distribution of content, on demand-access) and technology (Posetti, 2018a) (like the advent of social media platforms and the increasing accessibility of smartphones).¹⁰⁵

The impacts include fragmented and disintermediated journalism. They also involve much closer relationships between journalists, audiences and technology. As Professor Charlie Beckett has observed: “The result is a challenge to established journalistic practice and the advent of new relationships between public and news production” (Beckett 2008). He dubbed this phenomenon ‘networked journalism’ (Beckett 2008).

Lauk and Harro-Loit (2017) point to the challenges posed by these convergent processes to journalistic autonomy:

The current combination of economic recession and info-technological revolution is drastically affecting the working environment of journalists and challenging their autonomy more than ever. ...Periods of political and economic instability or crisis can bring about a break down in professional values, the loss of whole journalistic communities, and abrupt changes to journalistic practices, all of which have a detrimental impact on journalistic autonomy. (Lauk and Harro-Loit 2017)

The journalism ‘business model’ is shifting from product to process, from a transaction to a relationship and from a manufacturing to a service industry. In the process journalism is being redefined by the new technology and the associated development of new relationships with audiences. Ideas of temporality, ethics and professionalism are being challenged. The whole structure of news mediation and information flows is changing. As Beckett and Fenoye (2012) have explicated:

What we are seeing is a reformation of the whole structure of news mediation and information flows. To be successful at communicating in this new environment requires different tactics. If, however, the ultimate goal is creating substantial social or political change, rather than simply attracting attention, then a more strategic approach is also needed. This must include an understanding of ...the new relationships being forged between citizens, information and authority. (Beckett & Fenoye 2012)

This new understanding is pertinent to journalism’s mission in defence of freedom of expression, the right to know and the right to protect confidential sources and journalistic communications. Journalism culture needs rebooting in response to the development of these new norms. This requires what Hanitzsch (2007) has referred to as a ‘deconstruction of journalism culture’. The unprecedented upheaval in journalism and information access described above points to the need for development of

¹⁰⁵ For detailed global analysis of digital media trends, see the Reuters Institute for the Study of Journalism’s (RISJ) *Digital News Report*, University of Oxford. The 2018 edition is available at: <http://www.digitalnewsreport.org/survey/2018/overview-key-findings-2018/> [Accessed 20/7/18]

hybrid models of communication for social change. But before outlining what a suitable hybrid model of journalism, activism and international diplomacy might look like (following a review of existing alternative models of journalism practice and advocacy), it is important to note the inevitable professional resistance to attempts to redraw the perceived boundaries of current journalism practice.

This process is called 'boundary work' or 'paradigm repair'. Struggles over journalism are often struggles over 'boundaries'. Lewis (2015) notes that the process of setting boundaries around the profession of journalism, "...is to claim a kind of mapmaking authority: to succeed in marshalling the resources necessary to lay claim to a certain space and impose a particular vision about the character, meaning, and distinctiveness of that space" (Lewis 2015). Vos and Moore (2018) have identified five periods in the history of US journalism that help define a pattern of: paradigm experimentation, inception, formalization, normalization, and reconsideration. This pattern is complicated by the rapid development of transformative technologies as Carlson (2015) acknowledges:

...we'll need an approach to the boundaries of journalism that fully acknowledges the social and the material from multiple perspectives, allowing the range of human actors and nonhuman technological objects, and the interstitial spaces and relationships between them, to come into full view. (Carlson & Lewis 2015)

Highly relevant to this exegesis is Coddington's (2012) study of 'boundary patrol' in acts of paradigm repair in reference to two international newspapers' coverage of Wikileaks in 2010/2011. According to the study, *The New York Times* worked to portray Wikileaks as being 'out of bounds', especially regarding "institutionality, source-based reporting routines, and objectivity" (Coddington 2012). This work, of separating journalists and journalism from audiences, sources, subversive technology, and 'deviant' models of journalism, has become more urgent in the wake of 'radical transparency' (from Wikileaks to Snowden), with many mastheads and journalists seeking to reinforce their autonomy through distance. This was reinforced via Revers' (2017) study comparing German and American models of practice that identified the shared habit of seeking to re-entrench journalism's professional 'mythology'. But as Annany (2018) has argued, historically:

The authority of interpreters was derived not from how well they dispassionately adhered to ideals of ritualized distance and objectivity but how well they situated themselves within stories and audiences. Autonomy was premised not on freedom from interference that corrupted the professional communicator, but on a freedom to interpret that, ideally, helped readers relate to stories, understand possible interpretations, and appreciate their shared social conditions. (Annany 2018)

5.4 Drawing on the advocacy journalism continuum

Such paradigm repair and boundary work often involves mainstream professional journalists seeking to

differentiate themselves from alternative models of practice. Janowitz (1975) argued that 'advocacy journalism' was antithetical to objectivity and would therefore damage the credibility of journalism as a profession. However, Harcup (2005) points to one of the centrepieces of mainstream journalistic mythology – altruistic motivation: "I'm doing this to change the world." And that is a source of motivation that warrants tapping for activist journalism in the human rights space – in particular with regard to secure communications between journalists and their sources, a right that underpins the practice of independent accountability journalism. While journalism practiced within alternative press environments – with advocacy and activism at the core - has traditionally been placed outside the boundaries of acceptable mainstream journalism practice, such 'binary opposition' has been tested by research demonstrating substantial practice crossover.

In his study, Harcup (2005) provides empirical evidence to support the notion of movement along what he terms a 'continuum of journalistic practice': "...suggesting that consideration of the perspectives of hybrid practitioners, who have a range of journalistic experiences across alternative and mainstream media, can inform our understanding of journalism itself" (Harcup 2005). Similarly, Fisher (2016) argues that attempts to define journalism in terms of its separation from 'advocacy' are flawed because there is a strong strong tradition of advocacy within reporting: "...each work of journalism falls along a continuum of advocacy, ranging from subtle displays at one end, to overt at the other" (Fisher 2016).

Alternative models of journalism practice grouped under the (broad) umbrella of 'advocacy journalism' (Waisbord 2008) are frequently focused on social policy issues and social justice causes. They can be classified according to the following taxonomy.

5.4.1 Activist journalism

Activist journalism involves the use of journalistic research practices and storytelling techniques within activist settings. But as Simon (2015) has explained, the lines between activism are now increasingly blurred, so much so that Russell (2016) has written that the interplay of activists and journalists has resulted in the transformation of journalism: "Journalists and activists from countries around the world cross digital streams and end up updating media practices and strategies." (Russell 2016) A case study analysis by Barnard (2017) of the social media activation of this process during the #Ferguson protests in the US illustrates this point. He identifies the role of social media platforms in reporting and bolstering social change movements at the intersection of journalistic and activist practice: "While the traditions of objective journalism and affective activism persist, notable exceptions occurred, especially following acts of police suppression. The networked communities of professional and activist Twitter users were overlapping and interactive, suggesting hybridity at the margins of the journalistic field." (Barnard 2017)

5.4.2 Alternative journalism

Alternative journalism refers to the practice of journalism within ‘alternative media’ (sometimes called Indymedia), for example the South African anti-apartheid press of the 1970s and 1980s (C.f. Switzer & Adhikari, 2000) and community radio in developing contexts. As Atton (2003) has explained, alternative journalism can be understood in the context of alternative media that challenge the mainstream media’s institutionalised and professionalised practices:

...alternative media privileges a journalism that is closely wedded to notions of social responsibility, replacing an ideology of ‘objectivity’ with overt advocacy and oppositional practices. Its practices emphasize first person, eyewitness accounts by participants; a reworking of the populist approaches of tabloid newspapers to recover a ‘radical popular’ style of reporting; collective and antihierarchical forms of organization which eschew demarcation and specialization – and which importantly suggest an inclusive, radical form of civic journalism. (Atton 2003)

Rodriguez (2001) expounded an early theory of ‘citizens’ media’ in this space as a precursor to Gillmor’s (2004) ‘citizen journalism’. However, ‘alternative journalism’ continues to be practiced by professionally trained journalists affiliated with a cause or organisation, as Forde (2011) has documented.

5.4.3 Development journalism

In its early iterations, ‘development journalism’ was understood as applying critical reporting to state development projects, according to Ogan (1980), who also acknowledged that it was a contentious theory of journalism that involved serving “the development goals of a government”. In 2009, Jan Voordouw, a former Director with the Panos Network that works with journalists in developing contexts, described ‘development journalism’ as: “Community journalism (designed) to achieve larger objectives - social justice, improving health, education, bringing people together” (George 2009). While, Waisbord (2012) expounds: “One could argue that a journalism that contributes to participation, citizens’ expression and social justice...is not linked to the position of countries in the ‘Human Development’ index. Rather, it is a requirement for democracy without adjectives and geographical boundaries.” (Waisbord 2012) (See also: Wilkins 2012, Servaes & Malikhao 2012, Servaes 2009 and Waisbord 2014). ‘Development journalism’ theory was at the core of the New World International Communication Order debate that caused such controversy for UNESCO in the late 1970s and early 1980s, per the earlier discussion in this exegesis.

5.4.4 Interpretative journalism

Is generally understood as an increasingly prevalent opinionated form of journalism practice that is criticised in boundary repair processes as blurring the lines between news reporting and commentary –

perceived as a particular issue in political reporting, as McNair (2000) and Johnson and Graham (2013) have observed. It can be understood as journalist-led (rather than source-led) reporting and it is frequently associated with analytical styles of journalism present in long form current affairs and documentary. It may or may not involve the journalist as a story participant adopting first person narrative e.g. Gonzo Journalism (Mosser 2012), New Journalism (Wolfe 1973). Salgado and Strömbäck (2011) have devised a methodology for analysing content to determine the level of 'interpretation' in a story with reference to story formats.

5.4.5 Peace journalism

Peace journalism theorises that most journalism produced about war and conflict is inflammatory, and unwittingly fuels further violence. Alternative modes of practice suggested are summarised by Lynch & McGoldrick (2005) as: "when editors and journalists make choices – of what to report, and how to report it – that consider opportunities for society at large to consider and value non-violent responses to conflict." (Lynch & McGoldrick 2005; See also: Hanitzsch 2007; Kempf 2007; Galtung & Lynch 2010). The 17-point model for better practice devised by Lynch and McGoldrick is now applied to the reporting of politics, human rights and other potentially incendiary issues, as Youngblood (2017) has explicated.

5.4.6 Crusaders and muckrakers: at the fringes of the mainstream

'Crusading journalism', or 'campaigning journalism' (sometimes called 'muckraking') is usually situated within the mainstream tradition of 'accountability journalism' with a mission. Serrin and Serrin (2002) have documented the history of practice in US journalism, tracing its pivotal role in achieving progressive social policy outcomes and reform. It does not pretend to wear the mask of 'objectivity', instead favouring transparent practice. Resonantly, US academic David Weinberger (2009) has written "Transparency is the new objectivity." However, 'crusading journalism' incorporates many of the normative practices associated with the traditions grouped under 'advocacy journalism', as described above. Waisbord (2008) has mapped the development of 'advocacy journalism' globally in parallel with the development of activists who use the news media to promote their causes. Ultimately, he contends that it is "unthinkable that journalism is anything but advocacy journalism." (Waisbord 2008)

The lines have further blurred with the entry of new actors: professional advocates who no longer need to rely on traditional news media gatekeepers (Bruns 2005) to draw attention to their cause, instead adopting journalistic storytelling methods for internet-enabled self-representation. Many of these actors are not just exploiting the Digital Age's lowering of the bar to publishing and audience development to produce their own content for peer-to-peer distribution, they're filling a void left by declining legacy media. Organisations from Amnesty International to Human Rights Watch and Greenpeace are hiring journalists and training their advocates and activists in journalistic methods to undertake investigative reporting (Powers 2014; 2015), as independent news organisations reduce staff and coverage capacity

in response to the convergent crises outlined above. Kalcsics (2011) identified this trend in a study for Oxford University's Reuters Institute for the Study of Journalism:

[Aid agencies have begun] turning themselves into reporters for the mainstream media, providing cash-strapped foreign desks with footage and words gratis. While there is an increasing void in foreign reporting by the conventional media, there is a hugely competitive compassion market... humanitarian agencies have become slicker, PR-focused media operations, which want to feed a content-hungry disaster news market. (Kalcsics 2011)

As this convergence of investigative public sphere functions remains a work in progress, journalists making the move to activist organisations can find themselves at the receiving end of professional backlash – often performed publicly in the networked public sphere that is a hallmark of the social media era. Vine (2017) has studied one such case in New Zealand involving an experienced broadcast journalist who joined Greenpeace. He suggested that “advocacy journalism with strict ethical guidelines produced from within an organisation with a known agenda, may serve the public interest more ably than a fragmented mainstream journalism compromised by less obvious biases” (Vine 2017). Often, these actors collaborate with and work alongside ‘citizen journalists’ (Gillmor 2004) in order to bring verifiable information produced in the public interest to light. As a result of these developments, the UN has expanded the scope of protective legal instruments and normative frameworks (including source protection) originally designed to cover professional journalists to non-professional producers of public interest information. (Posetti 2017a)

5.4.7 Public and participatory journalism

Several other models of journalism are worth considering in the context of a hybrid model – at the intersection of journalism and human rights advocacy - for negotiating freedom of expression in public. The first three models are related: ‘public journalism’, ‘participatory/participative journalism’, and ‘collaborative journalism’. Public journalism emerged in the early 1990s in the US, driven substantially by NYU journalism professor Jay Rosen. He initiated projects designed to “redefine journalism in the spirit of, and on behalf of, the public.” (Rosen 1993) Rosen’s ‘Project on Public Life and the Press’, became recognised as “a model for embracing a civic professionalism and taking on a civic identity” (Rosen 1993). Rosen (2000) further developed the theory, challenging conceptions of ‘othered’ audiences, instead “Seeing people as citizens rather than spectators, readers, viewers, listeners or an undifferentiated mass. Starting where citizens start, but not ending where citizens end.” And the process that flowed from this method was a collaborative one: “Identifying issues of public concern through direct inquiry with citizens” (Rosen 2000). As part of this movement, several news organisations entered collaborations with communities. Annany (2018) has observed that “Some newspapers invented new organizational forms, reporting techniques, and principles of audience engagement to bring journalists closer to the readers, ostensibly grounding their professionalism in the communities

they served.” (Annany 2018; see also: Glasser & Craft 1996; Glasser 1999).

The ‘public journalism movement’ marked the beginning of an historic realignment of journalism with audiences and the ‘citizens’ agenda’. The mainstreaming of the internet in the late 1990s, followed quickly by the advent of social media in the early 2000s delivered augmented models of public journalism that enabled easy discovery and integration of ‘user generated content’ (UGC) and collaborative research and production processes that characterise ‘citizen journalism’, ‘participatory journalism’ and community centred models of ‘collaborative journalism’. These methods that allowed the construction of communities on social platforms enabled the crowdsourcing of story ideas, realtime access to witness accounts of events, and conveyed raw lived experiences direct to newsrooms (Posetti 2013). Wall (2017) contends that participatory journalism modes are now standard from the journalism classroom to the newsroom.

5.4.8 Slow journalism to solutions journalism

Three other models to note are also inter-related: ‘solutions journalism’, ‘constructive journalism’, and ‘slow journalism’. ‘Solutions journalism’ grew out of the ‘peace journalism’ movement and it, in turn, inspired the more recently emerging Danish model of ‘constructive journalism’. These models have the same objectives, summarised by Wenzel (2016): “Solutions journalism explores responses to systemic social problems—critically examining problem solving efforts that have the potential to scale.

Proponents of this genre of journalism believe these types of stories offer a pathway to engaging audiences” (Wenzel et al 2016). He described preliminary research that indicated news consumers are more likely to seek and share stories that are solutions-oriented. This approach can function as a meaningful intervention in local communities historically stigmatized, under-represented or ‘othered’ by daily news coverage. Wenzel noted that many of the participants in his study were enabled to “envision a way to become personally involved in community problem solving” (Wenzel et al 2016) – indicating that the practice could help deliver agency to alienated news consumers. ‘Constructive journalism’ is the name given to a theoretically and methodologically similar concept popularised by prominent Danish editor Ulrik Haagerup in his 2014 book *Constructive Journalism: How to save the media and democracy with journalism of tomorrow*. As noted by Mast et al (2018) theory and scholarship surrounding ‘constructive journalism’ is fledgling but it has identifiable roots in positive psychology.

Finally, the emerging concept of ‘Slow journalism’ is worth considering – and it has parallels with ‘solutions’ and ‘constructive’ journalism. ‘Slow journalism’ has its origins in the pushback against the instantaneous news cycles of the social media age that are characterised (for many audiences) by information overload and filter failure (Shirky 2009). It suggests a more investigative, longform, considered, methodical, reflective and explanatory approach to issues, events and characters. Drok and Hermans (2016) have conducted research that found: “...a considerable proportion of younger users

want journalism to be more investigative, inclusive, co-operative and constructive,” which they posit as the theoretical building blocks for future research.

The agenda-setting role of investigative journalism is also worth re-examining in the context of these collective theories. As Olsen (2008) demonstrated in her analysis of Danish investigative documentaries, stories that generate significant public debate often mobilise and engage civil society, and judge perpetrators of perceived offences, in a manner that could be construed as activist. Ultimately, Carey’s (1997) concept of ‘principled sense-making’ could help aid the collective appreciation of the shared social impacts involved with the erosion of freedom of expression rights like source protection and privacy. He contended that journalism was not simply “reporting that put the words and actions of others into simpler language” but principled sense-making that “invested the ordinary with significance” and helped audiences “come to terms with old realities in new ways.” (Carey 1997)

5.5 The rise of social media

The Digital Age removed barriers to publication, as described by Gillmor (2004) and signalled, as Rosen (2006) put it, “the shift of the tools of production to the people formerly known as the audience.” They became co-producers, of content, including news - a function and practice described as ‘produsage’ by Bruns (2008). They initially built audiences via email and chat-rooms before social media platforms dramatically amplified their reach. In many countries, by the mid-2000s, Twitter and Facebook had joined YouTube as social media mainstays, influencing the practices and professional identities of journalists - especially regarding verification, audience engagement, and the clash of the personal and public spheres that occur on social platforms, as I have previously demonstrated (Posetti 2009), and the distribution of content. As individuals formed networks built around trust, peer-to-peer distribution of content (particularly on Facebook) began to challenge traditional methods of content dissemination.

Users curated their own content streams - including content from news services, journalists and other reliable information providers - without mediation. As a result of distribution via ‘trust networks’ (users and peers), inaccurate, false, malicious and propagandistic content masquerading as news found increased traction (Ireton & Posetti 2018). For example, researchers Bakir and McStay (2017) have discovered that both emotive content, and content shared by a friend or family member is more likely to be redistributed on social media.

5.5.1 Crowdsourcing

Benefits of audience-networked journalism include the ability to crowdsource diverse sources, undertake collaborative verification – a process described by Garcia de Torres (2017), Hermida (2012) and me (Posetti, 2013) - and build loyal audiences supported by direct engagement between the journalistic actor and the news consumer, as I have previously described (Posetti, 2010), along with

Ahva & Heikkila (2016). They also empower the audience to ‘talk back’ in order to correct the record where reporters are in error, or to contribute collaboratively to research. Journalists and audiences can now bypass arbitrary restrictions and censorship, which were previously a fetter on democracy (Posetti, 2018c).

Journalists’ engagement with audiences and information sources via social media channels can also be seen as a noteworthy new feature of accountability frameworks that aid self-regulation and enable journalists to build appreciation for the purposefulness of their role in open societies. These interactions allow journalists to publicly and swiftly respond to valid critiques of their work, to instantly correct errors and to increase the transparency of their practice by ‘making content out of process’ (Posetti 2013). There is also the (not uncomplicated) advantage of increased transparency of news sources. As Marwick and Boyd (2011) have written, reporters can quickly learn much more about sources than they might ever have revealed in an interview, simply because both audiences and journalists are brought together by social media platforms that collapse contexts. Additionally, there is the risk that in forging relationships with potential sources on social platforms, confidential sources will be inclined to expose themselves inadvertently in insecure digital environments.

Guardian Editor-In-Chief Katherine Viner has assessed that “Facebook has become the richest and most powerful publisher in history by replacing editors with algorithms.” (Viner 2017) The social platforms have been hailed as ‘the new gatekeepers’ by Bell and Owen (2017), although they remain reluctant to accept responsibility for traditional publishing oversights - including verification and curation - despite making decisions to censor some content in a manner that undermines media freedom (Hindustan Times 2016). Efforts by the platforms to address disinformation and misinformation are evolving rapidly but their resistance to a) responding adequately, on a global scale, and b) taking publisher-style responsibility for the social and democratic impacts risks them becoming used as factories for ‘information disorder’ and online abuse (Posetti 2017b), further complicating their relationships with journalists and audiences in the networked press freedom environment.

5.5.2 Digital activism

Pre-social media, Wall (2003) summarised the impact of the digital revolution 1.0 on activist journalism: “Activist journalism has greatly benefited from the internet, which has created [for activist journalists]...a new means of creating and distributing their own versions of events, while combining that information with mobilising messages designed to prompt immediate responses” (Wall 2003). Channelling McLuhan (1964), Wall observed that: “It’s difficult to separate the movement from the medium.” That observation would become even more astute in the social media era.

The social web enabled the citizen/audience engagement objectives of public journalism to be leveraged at scale, with instantaneous interaction. According to Russell, “Activist journalists seek to mobilise

constituents, prompt action & create movement identities” (Russell 2016 p.115). She contends that: “Ultimately, digital activist journalism represents a new phase in social movement communications and in the definition of news itself.” (2016, p 122)

Social media now play a new role in brokering media activists ‘meaning construction’ and ‘identity building processes’ according to Milan (2015), who identified the ‘politics of visibility’ as being central, along with the interactive elements of shared identity. One interesting study highlighting the regenerative influence of advocacy journalism on mainstream practice comes from Harlow and Sallaveira (2016). From an examination of ‘native media’ in Latin America, the authors found that the highest impact sites are attempting to “renovate traditional, outdated modes of journalism, serving as alternatives to mainstream media and aiming to change society.” (Harlow and Sallaveira 2016). They determined that the sites’ “emphasis on using innovative, digital techniques is important for re-conceptualizing not just the role of journalism in a digital era, but also journalism’s relationship to alternative media and activism.”

An investigative reporter from the UK’s Channel 4 reflected on the value of social media era online activists to political communication, following the first viral campaign #Kony2012, acknowledging that: “I think we could learn something from them about how to get a message across, and how to talk to a generation that has stopped bothering to read newspaper and watch TV news” (Hilsum 2012). That’s a view shared by McNutt and Goldkind (2015) whose investigation of ‘e-activism’ (also called ‘cyberactivism’ (McCaughey & Ayres 2003), ‘cyberadvocacy’ (McNutt & Appenzeller 2004), ‘electronic advocacy’ (McNutt & Boland 1999), and ‘digitally-enhanced social change’ (Earl & Kimport 2011) highlighted the sort of cues journalists, UNESCO and civil society organisations working to advance press freedom rights could profitably respond to:

Activists can combine community organizing, demonstrations, lobbying and electoral strategies with e-mail campaigns, social media efforts and sophisticated data analysis. Campaigns can also be waged completely online. This creates a situation where you have...hybrid efforts using a mix of technology tools and traditional social change tools (McNutt & Goldkind 2015).

However, in the context of an exegesis focused on mitigating the risks and threats posed to investigating journalism via the ‘surveillance state’, it is important to acknowledge the dystopian perspective. As Brooke (2012) wrote: “We have the technology to build a new type of democracy but equally we might create a new type of totalitarianism.” Morozov (2011) also wrote presciently on the ways in which secretive, authoritarian and hierarchical regimes were countering the promise of the ‘age of openness’ in the first blush of the digital revolution. Cyberutopians¹⁰⁶ “did not predict how useful it [the Internet]

¹⁰⁶ Note: I will reflect on my time as a ‘cyber utopian’ actor later in this exegesis

would prove for propaganda purposes, how masterfully dictators would learn to use it for surveillance, and how sophisticated modern system of Internet censorship would become.” (Morozov, 2011)

5.6 Towards a hybrid journalism model

As part of an earlier research project in 2007, I developed a hybrid journalism model, borrowing from several of the theories discussed above, designed to produce more nuanced, resonant journalism about Muslim women (Posetti 2007). My objective was to counter the perpetuation of negative, inflammatory stereotypes in news coverage through an intersectional model that has broad enough applicability to reference here, as I work towards a hybrid alternative model for communicating freedom of expression issues. In this decade-old project, I proposed the exploration of a convergent model that drew on ‘participatory reporting’, ‘public journalism’, ‘advocacy journalism’ and ‘peace journalism’ that could also be seen as inspiration for a hybrid model of journalism that aids public awareness of human rights threats connected to privacy and freedom of expression. These approaches in combination have the capacity to address the shortcomings of traditional expressions of Western journalism – including misapprehensions about ‘objectivity’:

Participatory reporting can take the form of mainstream journalists embedding themselves in stories or making their experience central to their report... Advocacy journalism is more controversial in Western media culture because it eschews established (if outdated) notions of objectivity and instead involves subjective reporting and support or promotion of a particular cause. There are dangers inherent in such an approach - it's a short walk from advocacy journalism to propaganda. (Posetti 2007)

But I acknowledged that advocacy journalism had played an important role in democratisation and the advancement of social justice:

For example, in the coverage of the civil rights movement in the US and in resistance to South African apartheid. ...it may also be time to re-visit the ‘peace journalism’ model of reporting which aims to frame stories in a way that focuses on analysis and elicits a more considered response [and] a greater focus on the causes and consequences of problems – encouraging better understanding of alternative perspectives on the part of the audience. (Posetti 2007)

On the basis of this research, in 2010 I proposed a model for revamping Australian political journalism education in the form of a hybrid model, industry-partnered student journalism project (Posetti 2010) to address audience apathy towards election coverage. I put a similar plan into action in 2011 with the #ReportingRefugees project, which repurposed public journalism for the social media era in a partnership between my students, refugee support agencies and the Australian Broadcasting

Corporation (ABC). The objective was to educate and inform audiences while involving them in the framing of the content via crowdsourcing, and allowing them to collaborate on mythbusting processes designed to address inflammatory and racist coverage of the issues (Posetti & Powles 2013). Both of these projects informed my approach to developing an intersectional model to build a community of interest around *Protecting Journalism Sources in the Digital Age*.

5.6.1 The process of hybridisation

This process of hybridisation is not unique to journalism. The internet has delivered such intersectional transformation to political parties, interest groups and other powerbrokers through what Chadwick (2007) termed 'organisational hybridity' based on "the selective transplantation and adaptation of digital network repertoires previously considered typical of social movements" (Chadwick 2007). A decade later, Chadwick (2017) concluded that "New communication technologies have reshaped media and politics." According to what he described as a 'hybrid system':

Power is wielded by those who create, tap, and steer information flows to suit their goals and in ways that modify, enable, and disable the power of others, across and between a range of older and newer media... the clash of media logics causes chaos and disintegration but also surprising new patterns of order and integration. (Chadwick 2017)

Chadwick posited that "hybridity is creating emergent openness & fluidity as grassroots activist groups and even lone individuals now use newer media to make decisive interventions in the news-making process."

Russell (2016) identified this hybridisation as it manifests in the media – with particular relevance to this exegesis – as a product of "hacktivist sensibilities". She contended that the media is being "hacked and recoded" by "influential vanguard members working inside and outside journalism" (Russell 2016 p 15), noting that "professional journalism norms have long been challenged by alternative or radical media products and practices" (Russell 2016 p 15). In this category are 'hacker-journos' and 'programmer-tech wizards', whom she said "resemble digital age muckrakers in the ways they combine the libertarian and utopian hacker ethics 80s & 90s with the high calling of 'journalism as civic watchdog...who do journalism to effect change" (Russell 2016 p 48). With particular pertinence to the practice of journalism in the era of source protection erosion, Russell concludes that this self-identified group of journalists:

...aims to recode media power by making the workings of governments and corporations more transparent, empowering news orgs with digital tools and platforms that shape the material that outlets produce and that they believe will better foster an informed and active citizenry. (Russell 2016 p 17)

Arguably, this is evidence of an emergent journalism sensibility at the intersection of media activism and journalism innovation. Media anthropologist Jon Postill (2015) has identified “A Global techno libertarian vanguard” of hackers, lawyers and journalists working collaboratively to defend reporting based on confidential sources and information provided by whistleblowers. This work includes the participatory development of encryption software. Such an approach was identified in *Protecting Journalism Sources in the Digital Age* by Gavin Millar QC who chairs a program at Goldsmith’s University in London devoted to providing investigative reporters with ‘safe’ laptops to avoid detection. (Posetti 2017a p. 22-23)

5.6.2 Networked press freedom

As Starr (2012) has declared:

The digital revolution has been good for freedom of expression because it has increased the diversity of voices in the public sphere. The digital revolution has been good for freedom of information because it has made government documents and data directly accessible to more people and has fostered a culture that demands transparency from powerful institutions. But the digital revolution has both revitalized and weakened freedom of the press. (Starr 2012 p.234)

‘Press freedom’ is most frequently defined in the literature, in the news, and in civil society discourse in terms of the institutional news media’s separation and protection from overt interference and threats (C.f. Hocking 1948; Czepek & Hellwig 2009; Anderson, 2001; Bezanson 2010; Reid 2017; Annany 2018). The term ‘media freedom’ is considered by many to be a more inclusive term than ‘press freedom’ (with its print-era connotations and overtly professional orientation), however both terms can be generally and collectively summarised, as Reid (2017) asserts:

...as pointing to rights of media workers and producers, editors and journalists, to produce and disseminate media content freely, and without interference or fear of interference from the centres of power, whether that be: (1) the government, political actors, organs of the state; (2) corporates, big business, including but not exclusively media owners; or (3) in some countries, criminal elements, warlords, terrorist organisations or drug cartels (Reid 2017)

That is to say, press freedom is generally constructed in terms of the press’ rights to be free *from* fetters, intrusions and threats to independence in order to enable producers of verifiable information shared in the public interest to be free *to* do their work. This entails the freedom to ‘speak’ and to access

information.

However, in light of the ‘digital revolution’ and its rendering of the networked public sphere, all of the previously discussed theory and models of journalism practice now need to be viewed through the lens of Annany’s (2014, 2018) theory of ‘networked press freedom’ in order to consider a new, intersectional model for negotiating and communicating freedom of expression in public. He argues that it is time to recast and reconfigure Emerson’s (1970) concept of freedom of expression to serve democratic ideals & reimagine norms. His theory suggests that the nature of the networked era press freedom struggle demands a more collaborative approach and redefinitions, along with new practices:

Democratic self-governance requires both an individual right to speak and a public right to hear...to highlight the idea that liberty is a collective achievement, not only an individual right—a dual reading of autonomy...just as individual liberty requires conditions of collectivity, so too does the press’s institutional freedom. (Annany 2018)

Central to this idea is the concept of the press designing collaborations that ensure a public ‘right to hear’, not just a right for the autonomous press to ‘speak’. It’s a concept that seems familiar when considered in light of ‘public journalism’, ‘solutions journalism’, ‘advocacy journalism’, ‘interpretive journalism’, and other ‘journalisms’ designed to grant audiences agency, as the press reconfigures its ideal of autonomy in the networked public sphere. According to Annany, journalists are both ‘professional communicators’ who distance themselves from audiences and stories through the performance of ‘objectivity’ rituals, and ‘individual interpreters’ who craft stories designed to be meaningful and accessible to audiences, as Carey (1969) described. Annany’s view is that the press must earn its freedom through an interactive process of determining what kind of publics it wants to co-create. For the press to claim ‘freedom from’ (e.g. political interference) it must also assert (on behalf of its audiences) the ‘freedom to’ listen/hear, and consider its position in reference to its duty to engage with others: “the press earns its own freedom by helping to ensure the autonomy of its constituents” (Annany 2018). And to do that, it must interactively describe, inform, relate to, and contribute to the education of other citizens, while simultaneously listening to them. This requires the press to walk a fine line in order to claim its autonomy, according to Annany:

It must distinguish itself from others, while simultaneously acknowledging that much of its work happens with others. What does press freedom mean today, given that news production spans so many different actors, norms, practices, and technologies? Rather than simply being about distance from others, networked press autonomy might better be understood as a set of moves and orientations – separations and dependencies through which the press negotiates its uniqueness, leaving traces of how it understands its democratic role. (Annany 2018)

This applies not just to audiences but to technology: devices, platforms, algorithms, and Artificial Intelligence. Annany relates the concept of networked press freedom directly to journalists' relationships with their sources, through a careful balancing act involving:

...the freedom to cultivate relationships with sources but the need to negotiate with their interests and agendas for being sources; the power to invite sources into stories or broadcasts but the ethical duty to quote them directly or let them speak; the ability to construct balance and shape debates by combining sources with different viewpoints but the ultimate professional obligation to bracket your own interpretations (Annany 2018)

The interplay of socio-technical factors identified by Annany as central to the theory of 'networked press freedom' is also relevant to source protection strategies within news organisations and it manifests in several different ways. For example, through the deployment of technologies like PGP, encrypted apps and Tor networks that anonymise traffic, along with other practices like password security and secure drop boxes, journalists are negotiating relationships with, and separations from sources, technology, audiences and hostile actors. As the Snowden story and the Panama Papers demonstrated, journalists' ability to recognise threats from external forces and mitigate them via defensive digital strategies enabled their relationships with key confidential sources. As Annany has observed, "It is professionally beneficial for them to be close to sociotechnical security cultures, but such proximity brings personal risks. There is no one right distance that ensures both autonomy and security." (Annany 2018)

The interdependency of journalists, audiences and technology also makes journalists more vulnerable to targeted attack, including hacking, disinformation campaigns designed to mislead and pollute the news ecosystem, and harassment (Posetti 2018b; Ireton and Posetti 2018). Annany (2018) points out that the platforms (e.g. Google, Facebook and Twitter) have alerted journalists and worked with news organisations to improve digital defences, but it is this interdependency that makes the news organisations vulnerable. "In the case of the Twitter hacks, news organizations' closeness to the platform—relying on its security infrastructure to archive and deliver news—meant that they shared in the platform's security vulnerabilities. After the attacks, Twitter warned news organizations that more attacks were likely to come and asked news organizations to help thwart them." (Annany 2018)

Arguably, networked press freedom also necessitates the implementation of several of the recommendations from *Protecting Journalism Sources in the Digital Age*, including the need to inform the public about the impacts of source protection erosion and educate sources and whistleblowers in defensive digital strategies like encrypted communications. Such an approach, viewed through the lens of networked press freedom, could be conceptualised as 'networked source protection'.

5.6.3 A more audience-centred approach to media freedom

Reid's (2015; 2017) theory of counter-mythologising media freedom effectively extends the concept of 'networked press freedom' as an enabler of the right of publics to hear. She contends that, especially in the Global South, the rights of audiences to hear/listen need to be considered from the perspective of diverse (frequently economically disadvantaged) publics' capacities to access information. She suggests reconceptualising media freedom to include three key elements:

- Media freedom involves the freedom of media producers to "speak", otherwise known as freedom of expression.
- It involves the freedom to access the media - considering media freedom from the perspective of the audience and not only the media producer.
- Media freedom includes the freedom to respond to content which is carried in the media, which includes ordinary media users' ability to produce media content of their own.

Reid's main contention is that media freedom theories and strategies that focus exclusively or primarily on the rights of media professionals to collect and disseminate content is limiting and counter-productive because "The communicative chain of media messaging does not end once content is published." Her point being that news consumers in a networked public sphere now consume, share, augment, comment on and critique content (frequently in realtime) via social media, within news websites' digital feedback facilities, and through blogs, memes and other means *after* the content is first published. They also perform as collaborators on story research, verification and production in the social media age (Bruns 2008; Posetti 2009; Posetti 2013).

According to Reid (2015), then:

The term 'media freedom' in a more holistic sense certainly involves the notion of allowing journalists and editors to do their work freely and independently, but it also involves the freedom of the ordinary person to access and respond to that work. If the idea of media freedom is applied to media producers only, with no regard to the audience, then only a small part of the mass communications chain is being considered, while what is in a digital world arguably the more crucial part, is being ignored. The entirety of the media chain does not only involve media producers, but includes the audience, so the notion of media freedom needs to be applied to the whole chain, not only part of it.

Finally, in addition to recognising the right of diverse publics to hear, speak, reply, and access information under the media freedom umbrella, impediments to access must be considered. As Reid

explained (2018), in much of the Global South, the cost of accessing public interest information is prohibitive and the distribution of such content is inequitable and frequently not suitably linguistically diverse. “Under such conditions, individuals’ access to the media is entirely determined by how much money they have, where they live, and which language/s they speak” (Reid 2011). So, media freedom is not just about what people are permitted to say publicly, but also about what content they are permitted to access, the standard and availability of essential communications infrastructure, what languages such information is available, and what they can afford to access. The importance of this last point cannot be overemphasised. As Abrahams and Pillay (2014) reported from a study of media users in South Africa, while buying data bundles for mobile communications was viewed as essential by most participants, it was so expensive that they found themselves having to choose between feeding their families and being able to access digital communications.

This approach to reconceptualising media/press freedom theories for the networked public sphere, with an emphasis on audience freedoms, is instructive for the purpose of developing a new hybrid model for the global communication of freedom of expression rights – both through journalism and via direct engagement with audiences. It implies a responsibility to engage networked publics in the defence of freedom of expression rights connected to the practice of journalism, and a need to communicate the threats that source protection erosion poses to the media freedom rights of audiences (potential sources among them). But it also makes it incumbent upon journalists, civil society and UNESCO to factor the media freedom rights of audiences into their research and reporting on, and advocacy for, freedom of expression rights internationally.

5.7 Conclusion and summary

In this chapter I have reviewed a number of different models of journalism which underpin the approach to the intersectional work of this PhD project. I argue that there are a range of advocacy models of journalism - from development journalism to peace journalism, from public journalism to solutions journalism - which have at their heart, a desire to facilitate social change. I have also described earlier projects that I have been involved with and which also sought to draw on these participatory, public models of journalism to work for social change. These models, like the one described in this PhD project, can help to build engaged communities through a process of ‘making content out of process’, which in turn can begin to dissolve the traditional barriers between news producer and consumer. I concluded by looking at recent work describing a model of ‘networked press freedom’ (Annany 2018) and audience-centric media freedom (Reid 2017) which also highlights the interdependence of journalists, audiences and technology. Viewed collectively, these theories provide an historic anchor and a scholarly framework for the holistic *Protecting Journalism Sources in the Digital Age* project which brings together journalism, academic research, policy development and audience engagement to publicly negotiate space for freedom of expression in the Digital Age and advocate for the necessary protections to enable

the rights and work of journalists, activists and citizens.

Chapter 6: ‘Collective Deconstruction’ - A Critical Reflective Practice Account

“The challenge of being able to do rigorous and meaningful research while not pissing off any States involves an inherent tension that cannot be resolved.” - Dr Courtney Radsch, Advocacy Director, Committee to Protect Journalists and former UNESCO Senior Project Officer.

“I find it really problematic when the Organisations don’t stand up for their mandate, and if that means standing up in the face of State pressure, they should do it!” - UN Special Rapporteur, Prof. David Kaye

“For a serious investigative journalism nerd, who counts All the President’s Men among her favourite films, there was an appealing element of intrigue to all this. A kind of journalism romance. That romance was in part environmental.” – Julie Posetti

What follows is a Critical Reflective Practice account of the production and publication of UNESCO’s *Protecting Journalism Sources in the Digital Age*, and the themes at its core. It adopts a narrative non-fiction form and it is a product of a process that I identify as ‘cooperative deconstruction’. This description casts the interviewees informing this account as co-creators of knowledge and, in some instances, as contributors to a process of collaborative deconstruction/reconstruction of shared experiences with the objective of reaching a common or collective understanding. This practice acknowledges the value of fluid research ‘conversations’ around contested meanings of events and/or experiences present in individual recollections in forging, through a process of ‘interactive unpacking’, what could be understood as negotiated memory.¹⁰⁷

Here, I will enact and facilitate the intersection of theory drawn from feminist and analytic autoethnography, journalism studies, and Critical Reflective Practice¹⁰⁸, enabling an interplay of voices and characters. This hybrid storytelling exercise is part textual catharsis, part narrative non-fiction, part reportage. It also seeks to document the practice of an intersectional model for negotiating freedom of expression in public, in the ‘networked press freedom’ (Annany 2018) environment. I situate myself within this interplay of voices, and the tensions explored, and although I have enjoyed and been stimulated by the ‘interactive unpacking’ during the interview process, this exegesis is of course my own and the final responsibility for its analysis is also mine. Finally, this exegesis demonstrates the lived experience of a journalist-researcher, recognising that the private/personal and public/professional

¹⁰⁷ Note: my deployment of the terms ‘cooperative deconstruction’, ‘collaborative deconstruction/reconstruction’, ‘interactive unpacking’ and ‘negotiated memory’ does not indicate a willingness on behalf of all interviewees to self-identify as contributors to these processes and/or outcomes. The interviewees do not have co-responsibility for my analysis and conclusions, nor do they necessarily agree with them.

¹⁰⁸ Note: See detailed discussion of these theories and methodologies in Chapters 2-5.

spheres are inseparable and overlapping.

The book at the core of this PhD project was really a ‘labour of love’ in the service of journalism – an intense experience that developed close relationships and threatened to derail others. Its backstory is about: the process of conducting contentious research for an intergovernmental organisation in an age of mass surveillance and ‘strongman politics’; fraught working environments; interwoven personal and professional relationships; the value of practice-led research and; the importance of public conversations about difficult issues fundamental to freedom of expression rights. Ultimately, it’s a backstory that helped deliver a complex study about intersecting threats to freedom of expression and privacy – a study that has so far delivered impacts that extend from a newsroom in Pakistan to citations in the European Court of Human Rights and a UN General Assembly Resolution. It also sits at the centre of this exegesis which, in turn, features the voices of key actors associated with the book’s production. The interviewees contributing to this process, which I am describing as ‘cooperative deconstruction’,¹⁰⁹ are:

- Dr. Guy Berger: Director of Freedom of Expression and Media Development at UNESCO. Berger commissioned *Protecting Journalism Sources in the Digital Age* and we have collaborated on journalism education and research projects over the past decade. As Head of School at Rhodes University’s School of Journalism and Media Studies in South Africa, Prof. Berger invited me three times to be embedded as a visiting academic. My last Rhodes placement immediately preceded his move to UNESCO in 2011. I have since collaborated with him on two UNESCO book projects¹¹⁰ in addition to *Protecting Journalism Sources in the Digital Age*, a consultancy connected to the UNESCO Internet Universality Indicators study (UNESCO 2018c), and a range of conference panels.
- Prof. David Kaye: UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. As I was finalising the UNESCO study in 2015, he involved me (as an expert contributor) in the research process leading to his Report to the UN General Assembly on the protection of whistleblowers and confidential sources (Kaye 2015b). He subsequently championed publication of *Protecting Journalism Sources in the Digital Age* and cited it in his September 2015 Report in its ‘forthcoming’ state. We have sat on several international conference panels together.
- Dr. Courtney Radsch: Advocacy Director at the Committee to Protect Journalists (CPJ). She was previously a Senior Project Officer within UNESCO’s Freedom of Expression and Media Development Division, and she edited the first edition of the Organization’s flagship study

¹⁰⁹ See footnote 107 above.

¹¹⁰ These are: Posetti, J. (2017). *Fighting Back Against Prolific Online Harassment: Maria Ressa* in L. Kilman (Ed) *An Attack on One is an Attack on All Paris*: UNESCO <http://unesdoc.unesco.org/images/0025/002593/259399e.pdf> [accessed 29/03/2018]; Ireton, C & Posetti, J (2018) *Journalism, ‘Fake News’ and Disinformation* Paris: UNESCO <https://en.unesco.org/fightfakenews>

World Trends in Freedom of Expression and Media Development (UNESCO 2014c) – it was published the year my book was commissioned. The second edition of that *World Trends* report (UNESCO 2015b) featured a major extract from my study. Radsch ran a CPJ campaign on the implications of NSA whistleblower Edward Snowden’s revelations for investigative journalism in parallel with my UNESCO research commission, and we collaborated on a conference presentation at the Online News Association in Chicago in 2014 as both projects were commencing.

- James Risen: Prominent US investigative journalist who is a former National Security Editor and CIA correspondent at *The New York Times*, where he worked on the Snowden Files. He is now Senior National Security correspondent with The Intercept. He was involved in a 10-year legal struggle with consecutive US governments who sought to compel him to reveal his source/s for a book on a national security bungle. His case is featured in *Protecting Journalism Sources in the Digital Age* (Posetti 2017a p88).

6.1 A project takes shape: “No action can be taken on problems that remain hidden”

It was the middle of a hot Paris summer in 2014 when the contract for *Protecting Journalism Sources in the Digital Age* was signed by UNESCO and the World Association of News Publishers (WAN-IFRA). The air was thick with tension even before the research began.

Relationships: their interweaving; their traversing of the personal/private and professional/public spheres and; the strain they come under in the context of highly pressurised, contentious projects are a central theme of the backstories accompanying this exegesis and the book at its core. I will reflect on these issues later, but first I want to map the genesis of the book.

Protecting Journalism Sources in the Digital Age was commissioned by UNESCO when I was based in ‘the city of light’ as Research Fellow and Research Editor with WAN-IFRA and the World Editors Forum (WEF), on secondment from my position as a journalism academic at the University of Wollongong (UOW) in Australia. From Wollongong to Paris, I had gone in February 2014. It was quite the trajectory; from the campus of a working-class industrial city in Australia to one of the world’s most iconic capitals. Ten of my UOW journalism students also made the journey on a national grant I’d secured to support international student mobility. Two-by-two they came, to work at my side researching and reporting on the future of journalism from the privileged perspective of a global organisation with deep connections to newsrooms around the world, and roots in the freedom of expression challenges of World War Two.

Ten days after arriving in Paris, I began a process of collaboration with UNESCO’s Director of Freedom of

Expression and Media Development Guy Berger on research essentially triggered by Edward Snowden's revelations. He was seeking input from international editors and investigative journalists as he commenced work on a large project examining the state of privacy and freedom of expression online. That project – which ultimately led to the commissioning of my book – was mandated by 195 UNESCO Member States via a Resolution that had been moved by Brazil. It declared, in part: "...privacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law, and such privacy should not be subject to arbitrary or unlawful interference." (UNESCO 2013a)

Berger brought the Resolution to my attention in my WAN-IFRA Editor-Research Fellow capacity, suggesting that it deserved greater attention as it offered significant value as an endorsement of the role of investigative journalism to societies, underscoring the importance of protecting confidential sources. I agreed to interview him about the potential impact of this Resolution, and the research project that it mandated, with a view to facilitating the contribution of editors and investigative journalists via a story for the WAN-IFRA website I edited. Berger was especially interested in their views on the free expression-privacy nexus, "particularly as it plays out in cyberspace." (Posetti 2014)

In an interview published as part of my story, Berger made clear his concerns about the importance of confidential source protection:

Posetti: Why is privacy essential to the protection of journalists' sources?

Berger: Whistleblowers will fear contacting journalists if they have reason to doubt confidentiality. The effect? Less news about corruption or abuse will enter the public domain, and everyone will be information poorer. No action can be taken on problems that remain hidden. All this is why many countries have laws which shield journalists from having to reveal their sources.

Posetti: What are the potential consequences if sources' privacy is subjected to "arbitrary or unlawful interference"?

Berger: If there is no adequate protection, this has a 'chilling' effect in that people do not feel safe to speak to the press. This is why it is a key journalistic ethic to shield sources from being exposed, sometimes even sustained by reporters at great personal cost and in the face of a legal process. It is especially the untoward pressures, however, which put the reputation of the profession at greatest risk.
(Posetti 2014)

That story was published a day after a UN experts' seminar in Geneva on the 'Right to Privacy in the

Digital Age'¹¹¹ which was held in response to the historic UN Resolution of the same name passed in December 2013 (UN News 2013). In turn, that Resolution was informed by former Special Rapporteur on the Right to Freedom of Expression and Opinion, Frank La Rue. La Rue, who would ultimately join UNESCO as the Assistant Director General for Communication and Information and assume responsibility for publishing *Protecting Journalism Sources in the Digital Age*, issued a salient warning at the experts' seminar: "If we pitch national security against human rights, we'll end up losing both."

The following month, I entered discussions with Berger about a potential research collaboration with UNESCO on issues pertaining to journalism in the 'post-Snowden' era. These discussions began in the context of my editorship of the flagship World Editors Forum research report: *Trends in Newsrooms 2014* (Posetti 2014d) which identified the number one global issue of concern for journalists as: *The Urgent Need to Shield Journalism in the Age of Surveillance* (Posetti 2014c). As a feature of this *Trends in Newsrooms* chapter, I published an extended interview with Berger, which included his observations on one of the key themes, the capacity for mass surveillance to undercut legal source protection frameworks:

Posetti: With the benefit of UNESCO's global view, what is the future for journalism based on confidential sources post-Snowden?

Berger: Just because it is technically possible in many cases to uncover journalists' sources, does not mean that this is legitimate in terms of law or practice. By strengthening the social limits on surveillance, the technological threat to confidentiality can be mitigated. Increasing numbers of countries have laws protecting the confidentiality of journalists' sources, which demonstrates a recognition of why this confidentiality is valuable for the public interest. This is a trend that needs encouragement.

Posetti: What prospect is there to engage with States, nationally and internationally, to ensure that surveillance has boundaries, is transparent, has independent oversight and recourse, and also offers protection to whistle-blowers?

Berger: Governments themselves need to take the wider view: intrusion into the confidentiality of sources may yield short-term results for some state agencies, but in the longer term the impact is to cramp the extent of public information generated by journalists. Even spy agencies have an interest in sources and the public at large trusting the media, as this situation produces far more quality information that is relevant to intelligence, than even the biggest agency could generate through its own covert efforts. This and other arguments should be made

¹¹¹ See a video of the seminar here: <https://www.youtube.com/watch?v=fMcRDEyXspE&feature=share>

to legislators, oversight agencies, prosecutors, police, military and so on. (Posetti 2014c)

These perspectives were situated in the context of alarming testimony from some of the world's best-known editors and cybersecurity experts. Janine Gibson, then the Editor of *The Guardian's* US edition, led the paper's US coverage of the Snowden Files. She told me that the impact of his revelations could not be over-stated: "... the implications are so profound and so hard to talk about without sounding like a member of the 'tin foil hat brigade', but it is going to become one of the most preoccupying issues for journalists and should be more urgently [addressed]." (Posetti 2014d) The *Suddeutsche Zeitung's* then Deputy Editor-in-Chief, Wolfgang Krach¹¹², told me that the Snowden case had a two-pronged impact on journalism: "I think on one hand it will encourage more journalists than before to investigate before putting any trust or faith in the authorities. On the other hand, it is bound to change our journalistic behaviour; we have to re-think completely our dealing with sources, with people and whistleblowers who give us information." (Posetti 2014d)

Alan Pearce, journalist and author of *Deep Web for Journalists: Comms, Counter-Surveillance, Search*, told me that the threat to journalism posed by state surveillance was extreme: "Any reasonable intelligence agency is capable of tapping phones, intercepting email and following our every move – both online and in the real world." (Posetti 2014d) The chapter also quoted *Guardian* Editor-in-Chief Alan Rusbridger¹¹³ who said that it was nearly impossible for journalists to maintain the confidentiality of their sources because of the threat posed by surveillance. "Every journalist should understand that there is no such thing as confidential digital communication. None of us have confidential sources," he said (Posetti 2014d). Krach, who would go on to deliver the Panama Papers investigation to the International Consortium for Investigative Journalism (ICIJ) in 2016, as Editor-in-Chief of the German broadsheet *Suddeutsche Zeitung*, pointed to the need to revert to analogue era communications on sensitive investigations: "We are a leading newspaper with a strong team of investigating journalists; we have to be sure of our sources. The Snowden case revealed new and unbelievable things... The bitter experience for us is that we've been much too naive in dealing with our sources." (Posetti 2014d) These themes and experiences were reflected in the major case study on the global investigative journalism implications of source protection erosion featured in *Protecting Journalism Sources in the Digital Age* (Posetti 2017a pp103-120).¹¹⁴

Trends in Newsrooms 2014 was launched during WAN-IFRA's World News Congress in Turin, Italy, in June 2014. During that conference I anchored an on-stage interview with Berger in the course of which I

¹¹² Note: Krach is now Editor-in-Chief of the SDZ, which famously delivered the global investigative project The Panama Papers in 2016. That project was based on a mass data-dump involving a pseudonymous source calling himself 'John Doe' who insisted on using heavily encrypted digital communications to interact with journalists.

¹¹³ Note: Rusbridger is now Chair of the Reuters Institute for the Study of Journalism at the University of Oxford, where I am currently employed as Senior Research Fellow

¹¹⁴ These themes are also now starting to emerge in the academic literature that I analysed alongside my own research findings in Chapter Three of this exegesis

announced a World Editors Forum global survey on the impacts of mass surveillance on investigative journalism (Posetti 2014b). That survey was intended to feed the over-arching UNESCO internet study referenced earlier in this chapter and the data emerging from it was later included in the corpus for *Protecting Journalism Sources in the Digital Age*. Following the conference, I began collaborating with Berger on the design of a research project to examine the status of legal source protection frameworks internationally, under the umbrella of the larger UNESCO study. That research was commissioned through a contract with WAN-IFRA. The major expected research output was a report under the working title of ‘UNESCO Internet Study: Privacy and Journalists’ Sources’¹¹⁵. I was appointed by WAN-IFRA to lead the project, which eventually evolved into *Protecting Journalism Sources in the Digital Age*. Ultimately, I became both the project’s Chief Researcher and the book’s author.

6.1.1 Defining the scope: “You’re doing ‘God’s work’ for the profession here”

It was a project that was always going to exceed its budget in in labour, blood, sweat and tears. The contract¹¹⁶ required the mapping of developments in legal and normative source protection frameworks across UNESCO Member States (i.e. up to 195 countries but eventually limited by the methodology to 121 States) extending across a nine-year period. The original timeframe for completing the work was just three months, and the budget was only US\$20,000. The final concept-note (July 2014)¹¹⁷, on which the contract between the parties was based, stated the following:

The legal dimension of confidentiality, how it is defined and applied, raises a number of issues, several of which take on new aspects relevant to the digital age. Posed as questions, one may ask:

- *Since the last global survey, are there changes in the number of countries who have ‘shield laws’ or jurisprudence concerning journalists’ sources?*
- *What is the extent to which laws shield sources from governmental actors as well as private companies or individuals seeking the revelation of the sources?*
- *What are the patterns and processes as regards exceptions to confidentiality?*
- *How are the laws or jurisprudence being applied? Are there cases that have progressed to court, and have past jurisprudence or other arrangements played a role? Are there countries where protection is solely symbolic or simply not applied?*

¹¹⁵ Personal email correspondence with Guy Berger and early drafts of the research concept note and contract between WAN-IFRA and UNESCO, April-July 2014 (Private data collection)

¹¹⁶ This is a confidential document dated August 4th, 2014 and signed by both Guy Berger and the then WAN-IFRA Secretary General Larry Kilman

¹¹⁷ Excerpts from this concept note (published with UNESCO permission) are available here: https://blog.wan-ifra.org/sites/default/files/field_blog_entry_file/FINAL%20Research%20Concept%20Document_UNESCO_JOURNALIST%20SOURCES.pdf

- *How are those actors eligible for protection defined, and are they (or institutions such as media houses) required to be 'licensed' as a condition for protection with what attached conditions?*
- *What definitions exist for eligibility to claim the protection of shield laws where they exist in different countries? Are they limited to professional journalists paid by mainstream media organisations? How does the definition of who is eligible for protection relate to the new range of actors producing journalism on digital platforms, and to Internet intermediaries who may possess information about communications with sources e.g. bloggers, social media users?*
- *How does the definition of what is covered by protection relate to issues of metadata versus content, and to issues of data retention?*
- *Do national laws and jurisprudence on confidentiality have any cross-jurisdictional issues – for instance, applying to content published on servers in a different jurisdiction, but where the publisher has a presence in the given national jurisdiction?*
- *In an era of extensive digital footprints and surveillance by various actors, is there now a distinction to be made between secrecy (which may be increasingly difficult) and confidentiality, the latter relating to legal protections and limits on the use of any intercepted or retrieved digital communications?*

I wrote a story for the World Editors Forum/WAN-IFRA announcing the project and explaining its objectives and remit (Posetti 2014a). This was the beginning of the strategy to 'make content out of process'. Additionally, UNESCO stipulated that the research process would require:

- *An overview of the issues, and review of the main international instruments in terms of their digital relevance or otherwise.*
- *An updated audit of dispensations last examined for the 2007 survey. This mapping can be done on a template, allowing for quantitative tabulation of results and should indicate the form (e.g. Constitution; Law; and "other arrangements" such as - court jurisprudence, memoranda of understanding between editors' organisations and prosecution services; combination of the above, other).*
- *A more detailed analysis of the findings in terms of (a) application and (b) digital relevance. The analysis should be focused on where there has been a change or introduction of legislation, or cases in the recent past, that raise issues as to whether the particular dispensation is adequate to addressing digital questions such as: "Who is a journalist?"; the extent of digital data that may be protected etc.*

- *Recommendations about how protection of source confidentiality can be strengthened, and to whom the protection should apply.*¹¹⁸

It was clearly going to be a very demanding task. The evident scale of this project and potential for excessive demand on WAN-IFRA's resources spooked the organisation's leadership (understandably, in retrospect), and I had to convince the World Editors Forum Executive Director and WAN-IFRA Secretary General to sign on to the project following bureaucratic delays UNESCO's side. Re-reading the concept note four years later, in the absence of the first blushes of enthusiasm for a global research project produced for the UN in the service of journalism, I am genuinely surprised that we pulled it off. The initial delivery deadline for the study was November 2014 – just three months after the contract was signed. But that deadline was necessarily extended to January 2015, then March 2015, as the immense scope of the work became clearer to UNESCO and the project expanded. I submitted the final draft of the study in July 2015 - 10 months after beginning the work.

In retrospect, this could have been a three-year research project with a US\$200,000 budget. But I addressed it (and delivered it) as a 'mission' for journalism at a time of convergent crises confronting the profession, and particular challenges for investigative reporting in the post-Snowden era. Former *Guardian* Editor in Chief Alan Rusbridger told me during our 2015 interview for the study: "You're doing 'God's work' for the profession here."¹¹⁹ My then Research Assistant Angelique Lu¹²⁰ is still promising to get that quote cross-stitched and framed as a memento of our perseverance and sense of vocational purpose during the project, which involved many sleepless nights and much stress.

In an interview¹²¹ for this exegesis, UNESCO's Guy Berger told me that he had not anticipated at the outset of the research project that the cross-cutting themes of mass surveillance, data retention and handover, national security and anti-terrorism overreach addressed by the study would emerge as they did during the course of the study. He said he thought the research process would be simpler, involving updating a global list of laws in a narrow area of journalistic source protection. My interviews with Berger for this exegesis spanned several months¹²², evolving into three separate conversations and numerous follow-up emails. From my perspective the process became a kind of 'cooperative deconstruction'¹²³ of the book's genesis and production.

¹¹⁸ Finalised research commission 'concept note' dated July 2014, emailed to me by UNESCO on July 23rd, 2014.

¹¹⁹ Interview with Alan Rusbridger for *Protecting Journalism Sources in the Digital Age*, conducted at *The Guardian*, January 2015

¹²⁰ Lu, a journalism/law graduate who was one of my travelling UOW interns, went on to complete a BBC Journalism traineeship and she is now a reporter with the ABC in Sydney

¹²¹ Research interview a) conducted with Guy Berger, 2017

¹²² Two of these interviews were conducted face-to-face, one was via Skype

¹²³ Note: my deployment of the terms 'cooperative deconstruction', 'collaborative deconstruction/reconstruction', 'interactive unpacking' and 'negotiated memory' does not indicate a willingness on behalf of Berger or other interviewees to self-identify as contributors to these processes and/or outcomes. The interviewees do not have co-responsibility for my analysis and conclusions, nor do they necessarily agree with them.

6.1.2 Defining resources: “There was no time, there was no money”

The propensity for issues like resource limitations and budget cuts (Berger 2013) to impact on UNESCO-commissioned research was highlighted by Guy Berger in our interviews. He also acknowledged that there was an underestimation on his side about the complexity of issues I was studying for *Protecting Journalism Sources in the Digital Age*, and the number of other sensitive themes that it would intersect with. “There’s ambition to do lots of things, but there’s also perhaps an underestimation about how complex these things turn out to be. That also tends to drag out the process,”¹²⁴ he said.

Advocacy Director with the Committee to Protect Journalists (CPJ), Courtney Radsch was a senior project officer at UNESCO, working to Berger in the Freedom of Expression and Media Development Division from 2012 to mid 2014. Dr Radsch told me that she experienced a lack of clarity around the mandated purpose of UNESCO research in terms of objectives, which led to increased risk of politicisation in the absence of easily justifiable methodologies and outputs in accordance with projected impacts. That resonated with me. In the previously cited paper that I wrote with Reid (Reid & Posetti 2017), we pointed to issues regarding clarity of communications, context and guidance in connection with both the report Reid contributed to, *World Trends in Freedom of Expression and Media Development 2014* (UNESCO 2014c, edited by Courtney Radsch), and *Protecting Journalism Sources in the Digital Age*. Berger also highlighted the need for improved communications and guidance, particularly involving researchers commissioned for the first time to produce studies for UNESCO. “There could have been better communication all along,”¹²⁵ he acknowledged, in reference to my project. That’s a judgement that applies to me as the Chief Researcher, as well as to UNESCO.

This puts into context the sometimes-fraught email exchanges I had with UNESCO staff during the 10-month research process, as my own stress and impatience grew in connection with the project. Key tensions I experienced concerned: the lack of clarity surrounding communications; my attempts to balance intersecting (and at times conflicting) identities as journalist/freedom of expression activist/UNESCO project researcher/WAN-IFRA consultant/academic; laborious UNESCO requirements and processes; and bureaucratic delays. It is also now clear to me that UNESCO’s (noble) research ambitions and impressive intellectual leadership are frequently mismatched by extremely limited budgets and resources, and sometimes hobbled by geopolitical realities.

Helpful, too, in deconstructing my experiences of researching and producing *Protecting Journalism Sources in the Digital Age*, are the insights of Courtney Radsch in her capacity as the inaugural editor of the flagship UNESCO publication *World Trends in Freedom of Expression and Media Development 2014*.

¹²⁴ Research interview b) conducted with Guy Berger, 2018

¹²⁵ Ibid

She also coordinated the complex research process underpinning the study,¹²⁶ and in doing so she experienced many of the issues that would become familiar to me. Among these issues was the difficulty of trying to identify global trends in the face of inconsistent access to data internationally, and budgetary restrictions that meant that the ability to commission comprehensive field research across five UNESCO regions (each with their own diversities), or access private research databanks was extremely limited. “There was no time, there was no money,” she told me.¹²⁷

While the *World Trends* budget was significantly higher than the budget supporting *Protecting Journalism Sources in the Digital Age*, with 27 experts hired to cover seven thematic and cross-cutting issues across each of the five UNESCO regions, “It was not sufficient, and the individual authors of each chapter essentially did it for free,” Radsch said¹²⁸. One of the biggest struggles I faced in managing my project was the fact that I had to rely heavily on the goodwill of collaborating researchers and research assistants – many of whom were interns and receiving only a stipend from WAN-IFRA¹²⁹. I felt exploited at times by the process - I was working ridiculous hours, and too often through the night. But it was my choice to undertake the work and I was prepared to make sacrifices as the author – the one who would derive most from the book’s publication. I was much more concerned about those working to me. At the same time, I was juggling myriad other journalism and research projects for WAN-IFRA and WEF, and the perceived donation of labour to UNESCO, along with multiple (necessary) project deadline extensions, quickly became an issue, fanning internal tensions surrounding the project.

I’ll return to process later but first, back to Paris...

6.1.3 Baguettes, security threats, and a window on the Marais: “Did I tell you about the time...”

What fuelled completion of *Protecting Journalism Sources in the Digital Age* – other than adrenalin, a prodigious newsroom-born work ethic, a sense of mission, close collaboration with committed research assistants, a resourceful UNESCO project manager on loan from the Swedish state, Berger’s intellectual leadership, and an awful lot of cheap French wine? Perhaps it was the view from my dining table-cum-work bench over-looking the historic Paris district known as the Marais? Or the sounds of irrepressible Parisian life pumping below, summer and winter, day and night, in the bustling, colourful district that drew me in even when I wanted to throw my laptop out the window? Maybe it was the smell of all that

¹²⁶ Note: I reported for WAN-IFRA on the publication of the UNESCO study edited by Radsch in March 2014: <https://blog.wan-ifra.org/2014/03/24/new-unesco-report-maps-trends-in-freedom-of-expression-and-media-development>

¹²⁷ Research Interview conducted with Dr Courtney Radsch, 2018

¹²⁸ Ibid

¹²⁹ In France, interns are required to be paid a minimum amount for labour and my UOW interns received the appropriate stipend

fresh produce, and the taste of warm baguettes from the boulangerie at the foot of my stairs? It could have been the camaraderie inherently involved in teamwork on a purposeful project executed under enormous pressure in a romantic location. It was all of those things combined, I think. Along with a healthy dose of determination and a refusal to collapse at the finish line. There were also plenty of “laugh aloud now, because the only alternatives are insanity or sobbing” moments along the way. Such moments were often shared during weekend work-a-thons or ‘all-nighters’ in the presence of loyal interns and junior research assistants – some of whom I have since developed close friendships with.

Then, there were the ‘freaky’ moments. The moments that made me wonder if I should be wearing Janine Gibson’s ‘tin foil hat’ for the duration of the project. The moments that delivered the best dinner party anecdotes. The ones involving questions like: “Did I tell you about the time I was conducting online research about Russia and surveillance for that UNESCO study and watched as the URL in the search bar inexplicably flipped upside down like it was possessed?” True story. I screen-grabbed it and sent it to a cybersecurity expert who worked with investigative journalists for his assessment. His response: “I have never seen anything like it before. It’s either the Russians or the NSA.” Then, there was the time that I sat in our tiny Marais apartment, madly trying to meet the first UNESCO submission deadline while collaboratively editing the text in Google Docs with my then research intern Alice Matthews¹³⁰, when chunks of text referencing the NSA started moving of their own accord. Up and down the screen they zipped, before disappearing altogether. Fortunately, I had downloaded an earlier version of the manuscript and I was able to resurrect the text. Suffice it to say that I learned my lesson: do not attempt to store research on sensitive topics in the cloud – even if it is apparently innocuous and does not involve confidential sources. Especially when you’re writing about Edward Snowden, mass surveillance and the need to defend investigative journalism from unlawful and unwarranted intrusion...

While there may well be explanations unrelated to spycraft for these mysterious happenings, the fact that my newly heavily-encrypted laptop then developed a number of very strange habits - including a mousepad that appeared to have a mind of its own, frequently causing the cursor to scroll up and down uncontrollably - did unnerve me slightly. By the time I submitted the final manuscript to UNESCO, I was only able to start my laptop via hard reboot using an encrypted external hard-drive.

However, during these episodes, I couldn’t help but recall the account of Luke Harding, the *Guardian* journalist who wrote *The Snowden Files: The Inside Story of the World’s Most Wanted Man* (Harding 2013) after working with a small, cloistered group of journalists on the original story. After his book was published, he wrote about his own likely brushes with targeted surveillance and interception:

¹³⁰ Note: Alice Matthews was also a travelling UOW intern whose primary task during her Paris assignment was working as a research assistant on the UNESCO project. She is now an ABC journalist in Sydney, Australia.

I was writing a chapter on the NSA's close, and largely hidden, relationship with Silicon Valley. I wrote that Snowden's revelations had damaged US tech companies and their bottom line. Something odd happened. The paragraph I had just written began to self-delete. The cursor moved rapidly from the left, gobbling text. I watched my words vanish. When I tried to close my Open Office file the keyboard began flashing and bleeping. Over the next few weeks these incidents of remote deletion happened several times. There was no fixed pattern, but it tended to occur when I wrote disparagingly of the NSA. All authors expect criticism. But criticism before publication by an anonymous, divine third party is something novel. I began to leave notes for my secret reader. I tried to be polite, but irritation crept in. Once I wrote: "Good morning. I don't mind you reading my manuscript – you're doing so already – but I'd be grateful if you don't delete it. Thank you." There was no reply (Harding 2014)

I had written about Harding's experiences in *Trends in Newsrooms 2014* (Posetti 2014d), just before UNESCO commissioned *Protecting Journalism Sources in the Digital Age*. A few months later, I started looking over my own shoulder.

For a serious investigative journalism nerd, who counts *All the President's Men* among her favourite films, there was an appealing element of intrigue to all this. A kind of journalism romance. That romance was in part environmental. As a researcher and practitioner with a heart for human rights and a history of fighting for her own freedom of expression rights (ABC News 2010; Ricketson 2009), there's really nothing quite like shooting across Paris on the Metro, striding past the monuments of the well-heeled 7th arrondissement for research meetings and events at UNESCO, in the shadow of the Eiffel Tower. Standing up in one of UNESCO's grand circular chambers during a meeting of Member States in order to encourage contributions to my research project, unwittingly (and probably impertinently) using the microphone reserved for a Member State's representative, and waving my then pre-school age daughter's iPad encased in a rubber dinosaur mould to make my point, was a highlight. Despite the romance of UN-commissioned research having long ago faded for me, I still feel privileged when I think about the opportunity I was granted to do this work in the service of journalism and the human rights frameworks designed to defend its practice.

That was a feeling cemented in January 2015, when I sat in the office of then *Guardian* Editor-in-Chief Alan Rusbridger to interview him for the study. And it was repeated in June 2015, when I flew to Washington DC (watching *All the President's Men* on the in-flight entertainment!) to anchor a panel at the World News Congress where we launched the preliminary findings from *Protecting Journalism Sources in the Digital Age* with the International Consortium for Investigative Journalists' (ICIJ) Executive Director, Gerard Ryle and other key actors in the field (UNESCO 2015a). The panel I sat on with UN Special Rapporteur David Kaye, the then OSCE Representative on Media Freedom Dunja Mijatovic, and Special Rapporteur on Freedom of Expression with the Organisation of American States (AOS) Edison

Lanza at UN headquarters in New York during a session of the UN General Assembly on my birthday in October 2015 probably should also rate a mention (Oakford 2015). But there was something particularly special about the pre-launch event at the Frontline Club in London a month later. The Club showcases international journalists in regular talks at a venue where the profession's luminaries gather to dine and drink over their 'war stories'. It was an honour to share the stage with *The Times*' Investigations Editor Jonathan Calvert, the BBC's digital security guru Paul Myers, and prominent media QC Gavin Millar (whom I'd interviewed for the study), at an event anchored by the London Foreign Press Association's President, Paola Totaro (Churchill 2015). Each of these events underscored the genuine value of the research, the profession's eagerness to see it published, and the importance of curating public conversations around the forthcoming book – particularly as the wait for publication set in.

6.2 When the final UNESCO deadline is just the beginning of a long bureaucratic and diplomatic dance

I delivered the final manuscript to UNESCO at the end of July in 2015 - three days before I flew home to Australia from Paris. I'd spent a hot Parisian summer working through weekends, nights and annual leave, from our charming (but miniscule) fourth floor medieval apartment in Le Marais. I had ditched my promise to spend our final six weeks as Parisians with my long-suffering husband and daughter. Once again, 'that Sources Study' (as it had become known) took priority. I was not popular. And I was really disappointed about missing out on sharing these last days of our Paris adventure with them...as well as being gripped by 'Mummy-guilt'. But I was contractually obliged to deliver the complex study, which had grown to over 80 thousand words by the final (extended) deadline: July 27th, 2015. Courtney Radsch told me that when the 2014 UNESCO *World Trends* report was finally published, she felt like she had completed another PhD dissertation¹³¹. She felt proud but exhausted. I felt that way too. I was extremely proud. And relieved. But overall, I was utterly exhausted: physically, emotionally, intellectually and psychologically. In a word, I felt splattered. But what I didn't realise when I boarded the long flight home to Sydney on July 31st, 2015, was that it would take another 22 months for the book to wend its way through UNESCO's bureaucratic processes and political review systems before it would actually be published.

6.2.1 Diplomacy, bureaucracy and freedom of expression research for UNESCO: "Yes, one had to tread delicately..."

¹³¹ Research interview with Courtney Radsch, 2018

When the book was finally published and launched during UNESCO World Press Freedom Day celebrations in Jakarta in May 2017, it was touted as a study “three years in the making” (UNESCO 2017a). But the bulk of the work was done at high-speed, under great pressure, in a 10-month window, as described above. The next two years were spent negotiating publication, seeking opportunities to publish extracts, sub-editing, and exploiting every opportunity to keep the forthcoming book in the public sphere - partly to ensure it stayed on the UNESCO hierarchy’s agenda. It was a constant push. From my perspective - as the researcher and author eagerly awaiting publication - political sensitivities, budget cuts, and a vast, creaking international bureaucracy contributed to the seemingly interminable delays which caused great frustration, and prompted those of us involved in conducting the research to wonder aloud if this work would ever find its way onto the desks and into the inboxes of the journalists, editors, lawyers, legislators and policy makers it had been designed to aid.

Guy Berger told me that the UN is not a body that “names and shames”; that, he said, is the job of civil society organisations, while the UN engages in “quiet diplomacy”. UNESCO research on freedom of expression is not intended to “pass judgement”, Berger said, but rather designed to help nudge States towards consensus positions that build on existing UN decisions and resolutions on freedom of expression issues, while also pushing such knowledge into the public sphere to enable stakeholders to hold their governments accountable. It is about constructing knowledge and values that “stress the sweet spot of common foundation,” Berger said. In his assessment, the problems getting *Protecting Journalism Sources in the Digital Age* published after final submission were more to do with UNESCO’s stringent verification standards, and its bureaucracy, as well as a by-product of budget shortfalls and under-resourcing, rather than politics or censorship. “Yes, one had to tread delicately, but I don’t think there was any unwarranted removal of stuff that should have been there,” he said.¹³²

Diplomacy was certainly in play. I found the tensions between being an independent journalist and researcher, working under contract to a hybrid industry and civil society organisation with a Press Freedom remit (WAN-IFRA/World Editors Forum), undertaking research for UNESCO on freedom of expression issues that were very controversial and politically-charged, quite challenging. Berger disagreed with my suggestion that such tensions between UNESCO and commissioned researchers were perhaps more widespread than this single project. But he acknowledged the complexities and stresses involved in undertaking UNESCO research – especially in the context of requirements that claims from non-government sources within countries be cross-referenced, verified and/or balanced through examination of the official records and statements of Member States (e.g. publicly available government statements and departmental databases) for reasons of accuracy, fairness and diplomacy. This reality was exacerbated by an extremely limited research budget. “It’s very hard when you’re doing a global study like this one because it’s one small team of people busting a gut even to get superficial

¹³² Research interview c) with Guy Berger, 2018

information,” Berger told me.

This was also a point echoed by Courtney Radsch, who said that these factors compounded the problem of identifying global trends in the areas of freedom of expression and media development for the *World Trends* report that she edited and project-managed 2013-2014. “It becomes very difficult because if there’s concern about the overemphasis of Western sources but when there are no other sources, then you’re in this ‘catch 22’,” she said. All of this is focused on what Berger referred to as the need for “cautiousness”, “delicacy”, “unassailable evidence” and “complete balance”, which impacts on the style, narrative, tone, and argumentation within UNESCO publications.¹³³

In the case of *Protecting Journalism Sources in the Digital Age* a number of quotes, cases and incidents that I would have been content to publish as an autonomous journalist or researcher subject to academic peer review were removed during the editing process. One example is the editing out of all quotes from Courtney Radsch, including the following excision: “...journalists (are) being caught up in essentially spycraft, getting surveilled and targeted. And there is so little transparency about this whole ‘Five Eyes’ system and the fact that so many technology companies and related internet companies are based in the US, or members of the ‘Five Eyes’ nations.” Radsch’s statements about US government surveillance of journalists internationally (as documented by the Snowden Files) and her references to the torture of bloggers and activists in Syria for their passwords were also edited out¹³⁴. Additionally, caveats were applied to some aspects of the research that I felt were unnecessary, such as the repetitive UNESCO-inserted statement following all mentions of device seizures that: “This example is not provided with the presumption that confidential journalistic data was unduly exposed.” (Posetti 2017a p83¹³⁵). These subtractions and additions were features of a multi-stage process of editing and review typically undertaken at UNESCO – one designed to ensure verification standards are met and to address political ‘sensitivities’. The more contentious the content, the higher up the political hierarchy a draft document goes, until publication approval is granted.

I worked through the (ironic, from my perspective) freedom of expression implications of such processes and decisions with Berger during our interviews and email exchanges connected to this exegesis. He maintained that the contractual nature of the research (for *Protecting Journalism Sources in the Digital Age*) reduced autonomy, but it did not affect freedom of expression rights:

*I don’t think freedom of expression is the issue in these kinds of relationships. It’s not like your freedom of expression is taken away from you, you still have that, but you’ve entered voluntarily into a contract, and all contracts have conditions.*¹³⁶

¹³³ Research interviews a) and b) with Guy Berger, 2017/2018

¹³⁴ Note: I have no evidence as to the motivations behind these edits

¹³⁵ This caveat is repeated 11 times in the book

¹³⁶ Research interview b) with Guy Berger, 2018

While I had to defend the research against suggestions from within WAN-IFRA that such decisions could be perceived as UNESCO censorship of research with which the organisation was associated, I do not believe that the end product reflected direct censorship, nor do I feel that it compromised my professional integrity or ethical standards. I agree with Berger that in the case of *Protecting Journalism Sources in the Digital Age*, UNESCO's editing did not affect the essential integrity of the research, nor did it dilute the findings and recommendations designed to help limit source protection erosion globally.

That does not necessarily apply to all UNESCO projects and publications, however, and navigating these stresses and risks to publication can be difficult and complex. As Berger told me, the politics of freedom of expression advocacy and research at UNESCO is historically "sensitive". In fact, it can be traced back to the New World Information and Communication Order (NWICO) controversy which I documented earlier in this exegesis. These 'sensitivities' can manifest at the level of multiple political reviews by the UNESCO hierarchy, and they can require deft footwork and argument on the part of senior UNESCO bureaucrats, answerable to the UNESCO Director General's office, regarding potentially delicate issues. Berger described this as a process of "forwards and backwards", involving respect for those who ultimately "carry the can" for UNESCO publications, and whose view of the political landscape includes perspectives on how seemingly innocuous issues could become "explosive" or weaponised in the context of a particular geopolitical issue. If a UNESCO employee feels that the process or a specific decision by the hierarchy compromises their ethics or personal integrity, "then ultimately, one can always leave," Berger said.

In the case of *Protecting Journalism Source in the Digital Age*, the system of internal political review at the level of the Assistant Director General for Communication and Information (then Frank La Rue) and the Director General's office began after external peer review of the final draft and the process of subediting. It continued for many months, in parallel with multitudinous competing priorities, and it felt to me like a filibuster, leading to increasing tensions as publicly promoted publication dates were superseded - again and again. At several junctures, I put in writing to senior UNESCO staff, including Frank La Rue, that I was concerned that the study would be buried, and I continued to insist on its urgent publication.

6.2.2 When do interventions to respond to political 'sensitivities' amount to censorship? "To criticise an individual state is not allowed"

In contrast to the position that freedom of expression is generally not an issue in UNESCO's commissioned research publications because they are a product of a contractual agreement to produce a body of work in line with Organizational requirements, not acts of autonomous research or journalism, Courtney Radsch, who (as previously mentioned) worked for UNESCO in a senior role 2012-2014, told

me that she did experience what she felt was ‘censorship’ at the highest levels. Prior to joining UNESCO, Radsch occupied a senior position at the US-based civil society organisation, Freedom House, and she left UNESCO to become the Advocacy Director for the Committee to Protect Journalists (CPJ). She highlighted the inherent difficulties and ironies involved in navigating the publication of research on freedom expression issues inside what is ostensibly the UN’s only organisation with a freedom of expression mandate. “The challenge of being able to do rigorous and meaningful research while not pissing off any States involves an inherent tension that cannot be resolved,” Radsch said.¹³⁷ This, she said, is partly because, at UNESCO:

*To criticise an individual state is not allowed, especially if that individual state is important and influential...It’s much easier to critique or mention a small state with relatively little political sway than it is to criticise a large, important government, whether that’s the United States, or China, or Russia.*¹³⁸

Radsch was refreshingly candid about her experiences as a UNESCO employee coordinating a research project focused on freedom of expression issues. She said that she had experienced “editorial intervention of a political nature”¹³⁹ with regard to the report she edited and project-managed while working for UNESCO: *World Trends in Freedom of Expression and Media Development 2014*. This happened in the course of multiple high-level political reviews of the draft report, which included detailed discussions over specific words and redactions, Radsch said. According to Radsch, specific Member States were not to be named to avoid geopolitical ‘sensitivities’. This is an argument used by a number of UN bodies to justify exclusion of Member States’ names in a range of contexts¹⁴⁰. In the case of *World Trends in Freedom of Expression and Media Development 2014* (which Radsch edited), the names of most Member States and almost all supporting references were edited out of the main global report prior to publication.¹⁴¹ This amounted to what Radsch said was the loss of a “treasure trove” of hundreds of references that would have aided researchers internationally. She found this process extremely “frustrating” and “disappointing”.

However, Radsch’s critique of UNESCO research review processes was counter-balanced by respect for the Organization’s capacity for impact and its ability to influence Member States in the freedom of expression realm (in terms of developing norms and capacity-building), alongside appreciation for its historic role as a high-calibre international ‘think-tank’: a role she would like to see reinforced.

These issues are not limited to the Freedom of Expression and Media Development Division at UNESCO.

¹³⁷ Research interview with Courtney Radsch, 2018

¹³⁸ Ibid

¹³⁹ Ibid

¹⁴⁰ C.f. the UN AOC controversy discussed later in this chapter, along with the case study involving the Great Barrier Reef below

¹⁴¹ The global report (as distinct from separately published regional chapters) – which UNESCO promotes most widely – reflects this in its published form: <http://unesdoc.unesco.org/images/0022/002270/227025e.pdf> (Accessed: 31/8/18)

In mid 2016, there were reports of the censorship of commissioned research on the impacts of climate change on UNESCO World Heritage listed sites, in response to demands from Australia. According to documents and statements obtained by *The Guardian*, Australia had insisted on the removal of all references to Australian sites, including the endangered Great Barrier Reef. UNESCO obliged, reportedly “whitewashing” the study of all references to Australian sites and changing the report’s title, in line with Australia’s objections. (Readfearn 2016) The Australian Department of Environment confirmed that it had made the demands, and UNESCO eventually added a line to the press release accompanying the report’s release, stating: “At the request of the government of Australia, references to Australian sites were removed from the Report”. (Readfearn 2016) One of the report’s academic peer reviewers, Professor Will Steffen, said he was “astounded” by the ‘censorship’. “Perhaps in the old Soviet Union you would see this sort of thing happening, where governments would quash information because they didn’t like it. But not in Western democracies. I haven’t seen it happen before.” (Sleazak 2016)

During our interview, Courtney Radsch proposed a potential solution to what she had described as “an inherent tension” associated with UNESCO-commissioned research on freedom of expression issues within the context of an increasingly politicised organisation. She suggested a “shield” or “barrier” was needed between the Organization’s political hierarchy and its subject matter experts and consultant researchers, to preserve the independence and integrity of research processes and outputs. This is an interesting idea, and one that would be valuable to both UNESCO’s mandated research agenda and researchers undertaking work for the Organization in the sensitive freedom of expression realm – particularly when those researchers are affiliated with civil society organisations. It would also help boost trust in the independence of UNESCO’s research outputs with such organisations and the news media. But whether it is a realistic proposition in the context of the UNESCO ‘realpolitik’ of 2018 – a time of Member State withdrawal, massive budget cuts and the spread of ‘strongman’ politics and illiberal democracy - is another question (Coningham 2017). In my assessment, it seems unlikely that *Protecting Journalism Sources in the Digital Age* would pass through UNESCO political review processes in the current climate without meeting increased obstacles and requirement for more significant excisions.

6.2.3 When can you “name and shame” in the UN tent? “I think it can be frustrating working with UNESCO”

While UNESCO is clearly not in the business of “naming and shaming”, such a mandate is vested in the UN Special Rapporteurs under the auspices of the Office of the UN Human Rights Commissioner. Professor David Kaye has been Special Rapporteur for freedom of Expression and opinion since mid

2014.¹⁴² The role of Special Rapporteur involves the embedding of unpaid subject matter experts within the UN. They are empowered to advocate publicly for human rights as agents of the UN, and while “quiet diplomacy” behind-the-scenes is a feature of the role, the Rapporteurs are required to publicly call out individual Member States by name in the case of violations, or where there is a need for action. This occurs through statements, media releases, thematic reporting to the UN, and increasingly via social media engagement, with the objectives of demonstrating to other Member States that breaches are taken seriously, and that there is solidarity with human rights defenders and victims of abuse. But Kaye told me that in the current environment, Member States are “constantly trying to restrain the work that we do”.¹⁴³ And while moderate tone and balanced language are generally features of such public communications, Kaye said that approach is tested by States that are recidivist violators of human rights and freedom of expression. “It gets harder to maintain an even-tempered approach when you’re dealing with government’s like Erdogan’s Turkey or Bahrain,” he said.¹⁴⁴

Professor Kaye’s statements and reports on privacy, encryption, whistleblowers and confidential sources gave my UNESCO study impetus and ensured that it entered the realm of UN debates even before it was published. He cited my research in his second Report to the UN Secretary General, on the theme of whistleblowers and journalists’ confidential sources delivered in September 2015 (Kaye 2015b).

In his interview for this exegesis, Kaye expressed concern about UN organisations appearing to censor events and research – especially in the context of freedom of expression work. At the time of our interview in May 2018, he was in the process of writing to the UN Alliance of Civilisations (UN AOC) over the aforementioned¹⁴⁵ attempted censorship of a journalist’s presentation during a World Press Freedom Day event being staged at UN headquarters in New York. While he said nobody should be surprised that an organisation would respond as the UN AOC did in the face of pressure from a Member State, on the other hand:

*I find it really problematic when the Organizations don’t stand up for their mandate, and if that means standing up in the face of State pressure, they should do it!*¹⁴⁶

He also said that he did not endorse UNESCO’s reluctance to “call out” Member States but he emphasised that the Special Rapporteur roles were specifically created by the UN to address the

¹⁴² Note: Prof David Kaye replaced Frank La Rue in the role of UN Special Rapporteur and La Rue subsequently became Assistant Director General for Communication and Information. La Rue’s interventions (as documented in the ‘Impact Timeline’ featured in this exegesis as Appendix 1) as Special Rapporteur underpinned the UNESCO mandate that led to the commissioning of *Protecting Journalism Sources in the Digital Age* – a book he subsequently had to approve for publication. La Rue left UNESCO at the end of 2017.

¹⁴³ Research interview with David Kaye conducted via Skype, 2018

¹⁴⁴ Ibid

¹⁴⁵ See Chapter Four

¹⁴⁶ Research interview with David Kaye, 2018

inherent difficulties faced by traditionally politicised UN organisations (i.e. Member State-driven bodies like UNESCO) in pursuing ‘hard cases’.

I think it can be frustrating working with UNESCO, but it's also what the Organization is. That doesn't mean that I'm agreeing with all the things that they do. It's just that it's understandable in a context that's much more political than mine¹⁴⁷

This assessment makes sense to me, but it would be beneficial for these realities to be carefully and transparently explained to consultant researchers and civil society organisations partnering on UNESCO research projects ahead of commencing research and other public-facing work for UNESCO. In my experience, there is a reluctance to openly acknowledge the political factors in play up front, but they are clearly undeniable, and they require careful navigation if stakeholder trust in UNESCO statements, reports and research is to be maintained. If transparency is in fact the new objectivity, as Weinberger (2009) has asserted, this requires factoring into UNESCO's private communications with project partners, and its public engagement strategy, in my view.

6.4 Rebooting freedom of expression advocacy for the digital age: Lessons from *Protecting Journalism Sources in the Digital Age*

Member States and their policy makers remain the primary targets of UN initiatives in the freedom of expression realm, with civil society organisations, academia and the news media being significant secondary audiences. However, there is a much more expansive set of actors shaping the space for freedom of expression in 2018, according to David Kaye, who highlighted the importance of engaging broader publics in discussions and debates about fundamental rights. “I think now the audience is just much bigger,”¹⁴⁸ Kaye said. Key members of this expanded ‘audience’ are corporate actors like internet intermediaries¹⁴⁹, including Google, Facebook and Twitter. “It's not just States that are making the rules these days, it's also companies and they're very much subject to public pressure and public visibility,” Kaye told me.¹⁵⁰ He also indicated that “aggregate public opinion” is similarly important in an environment where policy is determined in the ‘networked public sphere’ – this approach increases in value in Western democracies like the US and Australia where there are no regional human rights courts to challenge domestic legal frameworks or judgements.

¹⁴⁷ Ibid

¹⁴⁸ Ibid

¹⁴⁹ Note: Internet intermediaries is a term encompassing internet companies from social media platforms to search engines, telcos and Internet Service Providers (ISPs). C.f. Mackinnon, R et al (2014) *Fostering Freedom Online: The Role of Internet Intermediaries*. UNESCO: Paris <http://unesdoc.unesco.org/images/0023/002311/231162e.pdf> [Accessed 19/8/18]

¹⁵⁰ Ibid

6.4.1 Encryption and anonymity: ““It’s very hard to get people to see how important anonymity can be”

Kaye cited the defence of encryption as a human right as an issue that benefited significantly from broad public conversation about the threats to privacy posed by various States’ attempts to undermine encrypted communications through ‘back door’ access¹⁵¹. He pointed to his first thematic Report to the UN in his Special Rapporteur capacity as research that triggered public debate and continues to be widely cited by freedom of expression advocates (Kaye 2015a). The difficulty and complexity of advocating for encryption as a human right when the counter arguments rely on narratives of anti-terrorism and public safety were also highlighted by Kaye:

*But the very fact that we were able to make these arguments [about encryption] in the context of a little bit of knowledge about the technology, and then a little bit more knowledge about norms is just really valuable.*¹⁵²

Central to the traction gained by the encryption cause was the ability of the general public to relate to potential impacts at the personal level – for example, in the context of health data breaches or digital security for banking. However, the parallel subject of anonymity preservation, a form of protected freedom of expression, was much harder to navigate publicly, according to Kaye. One reason for this is the current portrayal of anonymity as a tool and ‘cloak’ for trolls and online harassers. “It’s very hard to get people to see how important anonymity can be for dissenters, the political opposition, and the marginalised when we keep coming up against arguments that anonymity is more of a problem than a benefit for people,” Kaye said.¹⁵³

6.4.2 Protection for Whistleblowers: “If journalists cannot communicate in confidence with sources, they cannot do their jobs.”

Both of these issues – anonymity and encryption - intersect with the even more complex theme of protection for whistleblowers and journalists’ confidential sources, which is the core subject of this exegesis. It is also a subject that Courtney Radsch has direct experience of advocating for, having led the ‘Right to Report in the Digital Age’¹⁵⁴ campaign for CPJ in 2014/2015 in response to the Snowden revelations. “That was really designed to leverage the attention of the public to the extent that there

¹⁵¹ C.f. Merckell, R (2018) *When is ‘not a backdoor’ just a backdoor? Australia’s Struggle With Encryption*, The Conversation: <https://theconversation.com/when-is-not-a-backdoor-just-a-backdoor-australias-struggle-with-encryption-79421> [Accessed: 28/8/18]

¹⁵² Research interview with Prof David Kaye, 2018

¹⁵³ Ibid

¹⁵⁴ See the CPJ campaign resources here: <https://cpj.org/campaigns/digital-freedom/right-to-report-journalists-surveillance-prosecution.php> [Accessed 20/8/18]

was attention on the issues du jour and really narrow in on the impact on journalists,” she told me. The objective of this campaign was to highlight the impacts of mass surveillance on journalists’ safety and their ability to do their work, with the erosion of source confidentiality the core focus. This involved a hybrid strategy of direct conversations (with journalists, editors, technology companies and policy makers); conferences and public panel discussions designed to cross-pollinate knowledge from the tech, policy and journalism sectors (and encourage collaboration between Silicon Valley executives, digital rights activists and the mainstream press); and reportage on the issues. The specific point they sought to highlight in all of these interventions was this: “If journalists cannot communicate in confidence with sources, they cannot do their jobs.” Radsch and I collaborated on a presentation to the Online News Association annual conference in Chicago in September 2014, where we introduced our respective projects to the audience of digitally savvy reporters.

6.4.3 Public facing reportage on protecting journalists: “This is something you have to care about.”

At CPJ, public facing reportage is “critical and essential and foundational” according to Radsch. In fact, the organisation doesn’t advocate on issues that they don’t have reporting on. The purpose of this strategy is to engage the core stakeholder community of journalists, but also to enable amplification and production of an evidence base to support claims. In the case of the ‘Right to Report in the Digital Age’ campaign, the reporting undertaken by CPJ on the impacts of mass surveillance on journalists internationally was relied on in briefings with the White House, the Department of Justice, Congressional officers, the EU and tech companies. The relevant UN Special Rapporteurs were also included in this multi-pronged approach. Additionally, explanatory reporting was the foundation of alliances with industry that necessarily took source protection from an ‘inside the beltway’ issue concerning only elite national security and investigative journalists, to a theme worthy of broader coverage. The fundamental message Radsch delivered to journalists and news organisations was: “This is something you have to care about. It can’t just be other people fighting on your behalf. This is about your fundamental ability to do your job.” The results included high profile journalists signing up to an online petition and major news organisations like the Associated Press, Bloomberg and Al Jazeera partnering in the campaign. The flow-on effect was increased mainstream media coverage of the issues which continued in the context of more recent campaigns designed to focus attention on the related problem of device searches and seizures that journalists are increasingly facing at the US border under the Trump administration (CPJ 2017). The broad public impact of the ‘Right to Report’ campaign is something that Radsch told me she brought up with tech companies and policy makers when advocating for digital journalism safety.

In the experience of UNESCO’s Guy Berger, however, it is much harder to get broad public traction on a

“niche” issue like confidential source protection compared with themes like journalism safety. He saw *Protecting Journalism Sources in the Digital Age* as a study with a core audience comprised of: Policy makers within UNESCO Member States; news organisations; investigative journalists; civil society organisations; media lawyers and, potentially, the judiciary. UNESCO does target broader audiences in connection with media and information literacy initiatives, along with World Press Freedom Day activities and campaigns related to the murder of journalists with impunity, in the interests of awareness raising and developing capacity. However, Berger felt the complexity of issues connected to the protection of confidential sources, combined with widespread public “ignorance” about the related themes, meant that the study was unlikely to find broader traction. Additionally, he highlighted the ideological and political impediments to defending confidential source protection as an essential freedom of expression norm. When you speak about a journalist being asked to hand over confidential sources in a terror case, for the public the main question is likely to be “Why should journalists be exempt from helping to bring criminals to trial?”, not whether the case is threatening their own privacy or their right to know, according to Berger.

While these factors were relevant to my strategy of ‘making content out of process’ and attempting to engage broader communities in debates at the heart of the study, I believed that the convergent threats to confidential source protection that I was identifying in the course of the research process told a story that demanded broader public understanding and engagement – especially if the research was to have a meaningful impact on policy in countries where the networked public sphere is regarded as a virtual constituency (Posetti 2010)¹⁵⁵. I also concluded that in order for source confidentiality to be defended in the Digital Age, potential sources and whistleblowers required increased awareness of, and education in, secure methods of contacting journalists, along with an understanding of the potential impacts of privacy erosion on their safety and well-being more broadly. So, the importance of wider public engagement with the research, and the issues intersecting with it, grew in parallel with the process.

6.4.4 Making content out of process and maximising impact: “Several bites at the cherry...”

As a result of my conclusion that broader public conversation about the themes emerging from the research would be valuable (if not essential) to maximising impact, I embarked on a strategy of building ‘communities of interest’ around the action-research process while it was underway. This extended to the crowdsourcing of potential research participants. For this purpose, I used social media channels, professional blogging and mainstream media commentary to educate core audiences about the complexities, and to demonstrate more broadly the potential impacts of source protection erosion on

¹⁵⁵ Note: US President Donald Trump’s Twitter account @realDonaldTrump has neutralised cynicism about the prospect of world leaders leveraging social media audiences via direct engagement

journalists in connection with the public's right to know.¹⁵⁶ After the full study was delivered to UNESCO, and as we counted down the months to publication, I also began writing articles for major newspapers and continued speaking at high profile events about the research. Simultaneously, UNESCO's Berger began speaking about the project at internet governance, media freedom and tech conferences internationally.

Central to this strategy was our collaborative decision to incrementally publish outputs from the study as the UNESCO review process proceeded. In the first instance, this involved the production and publication of a four-page leaflet which was also published online in English and French (UNESCO 2015c). It summarised the key findings of the research and presented the 11-point model for assessing the viability of a country's legal source protection framework, and it was timed for release at the World News Media Congress in Washington D.C. in June 2015. Just before our Congress panel began, I published a story about the launch of the 11-point framework for WAN-IFRA's website (Posetti 2015d) which was shared across panel participants' social media accounts, along with those of WAN-IFRA and affiliated organisations. Berger also wrote a story for UNESCO's website following the launch (UNESCO 2015a). As a result of this collaborative public 'noise-making', prominent UK journalist and academic Roy Greenslade wrote a story for *The Guardian* about the research, pointing to the forthcoming book and asking: "In an era when whistleblowers are under attack from the authorities, and confidential sources are being compromised by state surveillance, how can the people who provide journalists with valuable information be protected?" (Greenslade 2015).

Subsequently, in September 2015, UNESCO published a chapter from the forthcoming book on the gender dimensions of source protection as a separate leaflet (UNESCO 2015d), which I also produced a story about for WAN-IFRA (Posetti 2015e). Two months later, a major extract from the book was published in the second edition of *World Trends in Freedom of Expression and Media Development: 2015 Special Digital Focus* (Posetti 2015c pp61-92). It covered the main findings, recommendations, the gender aspects of the research, and the 11-point framework for assessing source protection standards. Once again, I wrote a story for WAN-IFRA/the World Editors Forum about the publication of the chapter from *Protecting Journalism Sources in the Digital Age* (Posetti 2015f) which was cross-published by a range of international media industry websites and magazines, further extending the reach. This process of staggered, amplified content release allowed us to keep the conversation alive during the long wait for publication-in-full.

My strategy of 'building content out of process' (Posetti 2013) in combination with 'going direct' to audiences through self-representation via social media channels, and explanatory reporting for WAN-IFRA about each phase of the research project, led to ongoing public speaking invitations. These

¹⁵⁶ Note: See the 'impact timeline' featured in this exegesis 9.1 for details of these outputs

included a seat at the table with UN Special Rapporteur David Kaye during an October 2015 panel staged at UN headquarters in New York to coincide with his second major report – on the theme of protecting whistleblowers and confidential sources. That appearance triggered reportage about *Protecting Journalism Sources in the Digital Age* by *Vice* (Oakford 2015) and other major media outlets. Berger pointed out that the stretched production timeline was frustrating, but it gave us “several bites at the cherry” instead of “coming out in a flash” and disappearing.¹⁵⁷

Then, in 2016, I wrote a high-profile Op-Ed about the creeping threat of source protection erosion for *The Sydney Morning Herald* that was carried across Fairfax Media titles on World Press Freedom Day (Posetti 2016). This process served to both stimulate ongoing public conversation about the forthcoming book and demonstrate the expectation of widespread interest in its publication, at a time when there were suggestions that it might never be released.

When the book was eventually published on World Press Freedom Day the following year (2017), I once again wrote an editorial for *The Sydney Morning Herald* on related themes (Posetti 2017b), and I filed separate pieces for The Conversation, MediaShift, WAN-IFRA, and the Global Investigative Journalism Network (GIJN)¹⁵⁸. These pieces, in turn, triggered mainstream news coverage of the book’s launch, with stories featuring prominently in prime-time ABC news bulletins in Australia, for example (Marchese 2017). The major push for traction culminated in an Australian launch of the book in Sydney at the end of November 2017¹⁵⁹. Tickets to the public event, featuring two of Australia’s top investigative journalists and anchored by me, sold out and the associated hashtag #ProtectSources trended in third place nationally on Twitter on the night¹⁶⁰. The University of Wollongong, the Media Entertainment and Arts Alliance (the national journalists’ union) and the peak industry body, The Walkley Foundation, were event partners, and I wrote a story for the national journalism journal *Walkley Magazine* to mark the launch. (Posetti 2017c) The packed venue, overlooking the Sydney Opera House, demonstrated the wide appeal of the central issues with a broad range of representatives from civil society organisations, academia, media outlets and the general public in attendance.

6.4.5 Measuring reach and impact: “Very often you’re looking at long chains of causality and concatenation”

For UN actors, advocacy is often focused on what Radsch described as the “long game” of influencing norms and standards to support the free flow of information – a long game that involves a very

¹⁵⁷ Research interview b) with Guy Berger, 2018

¹⁵⁸ See ‘impact timeline’ 9.1 for a curated list of associated outputs

¹⁵⁹ See ‘impact timeline’ 9.1 for a curated list of associated outputs, including events

¹⁶⁰ See: <https://twitter.com/Trends5AU/status/933704197740019712> [Accessed: 16/8/18]

convoluted multi-stage process of impact. But impact, reach and stakeholder engagement are vital ingredients in the recipe for change, and measurement of those elements is increasingly important – especially to funders. Berger, Kaye and Radsch all noted the difficulty of developing metrics to evaluate impact connected to freedom of expression research, publications and campaigns. This is partly due to the fact that information alone rarely leads to change, and the collaborative nature of efforts to reform laws and policy - which often involve coordinated and concurrent campaigns, with inputs from UN actors, civil society organisations and the media. As Berger put it, when examining qualitative outputs “very often you’re looking at long chains of causality and concatenation, along with long time frames.”¹⁶¹

There’s also the need to differentiate between reach (i.e. the spread of content) and impact (i.e. impetus for change). But base level digital data is still a useful indicator of reach. According to UNESCO’s own metrics¹⁶², in the first year after publication (ending May 2018), *Protecting Journalism Sources in the Digital Age* had been downloaded approximately 10,000 times.¹⁶³ Meanwhile, *World Trends in Freedom of Expression 2015: Special Digital Focus* (which featured a major extract from *Protecting Journalism Sources*) has been downloaded 10,300 times in English and another three thousand times (in total) in French, Arabic, Spanish and Russian between November 2015 and May 2018¹⁶⁴. Unfortunately, UNESCO doesn’t routinely track the source of referrals, nor the location of downloads. Approximately 600 printed copies of *Protecting Journalism Sources in the Digital Age* have also been distributed by UNESCO, along with 1000 copies of the English language brochure.¹⁶⁵

Berger pointed to conversations among journalists connected to media coverage and events related to *Protecting Sources in the Digital Age*, as one indicator of its impact. Pakistani editor Zafar Abbas’ public testimony that he had used the draft of the book that I supplied him in 2016 to successfully stave off charges (which came with the risk of imprisonment), after one of his journalists at *Dawn* refused to hand over their mobile phone to security police on a source-hunting mission was also noteworthy, Berger said.¹⁶⁶ Similarly, during the WAN-IFRA World News Congress in Lisbon in 2018, I was advised by a journalist from the South African investigative journalism centre amaBhungane, that they were using the book for advocacy work pertaining to investigative journalism. At the same event, a prominent Irish editor also told me that he would be consulting the book in the context of a tribunal investigating the case of a whistleblower the following week.

¹⁶¹ Research interview b) with Guy Berger, 2018

¹⁶² Supplied by UNESCO via email on May 19, 2018.

¹⁶³ Note: Budget shortfalls meant that this book was only published in English. Typically, such publications are also published in French, Spanish, and Arabic (among other UNESCO languages). This was something Berger noted regret about. However, the brochures were translated into French and the 2015 *World Trends* report that featured a substantial extract from the forthcoming book was translated into multiple languages

¹⁶⁴ Figures current at May 2018

¹⁶⁵ Email correspondence with UNESCO officials August, 2018

¹⁶⁶ Note: Abbas told this story when he was on a panel with Berger and me at the World News Congress in Durban in June 2017.

Impact within UN contexts is also relevant, and the aforementioned citation of my book pre-publication by UN Special Rapporteur David Kaye in his 2015 thematic report to the UN General Assembly, on protection of whistleblowers and journalists' sources, was significant (Kaye 2015b). The UN Secretary General's mention of my research in his Report on journalism safety to the UN General Assembly (UN Secretary General 2015) was also important, even more so the UN General Assembly Resolution on journalism safety that was carried in November 2017 (UN General Assembly 2017a). That Resolution recognised the value of encryption to source protection and it cited UNESCO's *World Trends in Freedom of Expression and Media Development 2015: Special Digital Focus* that featured a major extract from my research. But perhaps the strongest evidence of 'real world' impact flowing from the book is its citation in a favourable 2017 judgement from the European Court of Human Rights in a source protection case brought by a Norwegian journalist (Becker vs. Norway, ECtHR. Application no. 21272/12). Judge Tsotsoria's concurring opinion attached to the judgement reads in part:

*...we are living in the modern digital era where the legal framework of the protection of journalistic sources is under significant strain. This expands the risk of erosion, restriction and compromise in the work of journalists, with an impact on freedom of expression, the media and investigative journalism in particular [Reference: See generally, Protecting Journalism Sources in the Digital Age, UNESCO publication 2017]. The Court has been a frontrunner and an advocate of judicial protection of journalists and their sources and in so doing it has also served as an inspiration for many other jurisdictions. This path should not be reversed.*¹⁶⁷

Prof. David Kaye also mentioned this judgement as evidence of impact in reference to his previously noted Report to the UN General Assembly on protection of whistleblowers and journalists' sources. The judgement references his 2015 Report, which in turn cites my study. In addition to citations in such judgements, mainstream media coverage, and civil society campaigns, Kaye looks for evidence of impact in terms of law and policy reform, and direct outcomes like the release of journalists from prison following interventions.

At CPJ, Radsch told me that a range of metrics informs the organisation's monitoring and assessment of impact and reach. In terms of impact, taking the example of advocacy connected to the murder of journalists with impunity, metrics examined by CPJ include an assessment of investigations and the rate of prosecutions connected to cases about which they have made representations. And they count the responses they receive from governments to their requests for information or action, along with policy changes that they can connect with particular campaigns. In terms of broader impact, they also look at

¹⁶⁷ European Court of Human Rights (5th Section). Judgement in the case of Becker vs. Norway (Application no. 21272/12). Issued 5 October 2017 in Strasbourg. Available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-177349%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-177349%22]}) [Accessed: 19/8/18]

the number of conferences where their campaign themes are included, how many national news outlets cover their interventions, and the number of report downloads, for example. Social media metrics are also considered for evidence of reach (rather than impact), with attention paid to the sharing by key ‘influencers’ and target groups.

In general, the Freedom of Expression and Media Development Division of UNESCO doesn’t deploy an orchestrated strategy of communications, monitoring and impact/reach measurement in connection with its research outputs. Rather, according to Guy Berger, it has been a case of “produce it, try to promote it to the extent one can, and hope it becomes visible.”¹⁶⁸ The Division is now moving towards integrating a holistic communications strategy from the outset for its major research output – the biannual *World Trends* report – with emphasis on shareable infographics, and a fully-fledged social media campaign. This is partly about addressing the disconnect between what Berger described as a 19th century model of book-publishing and 21st century patterns of information consumption and distribution.

However, ongoing resourcing issues and chronic budget shortfalls experienced by UNESCO (Coningham 2017; Berger 2013) will likely prohibit the extension of such a strategy to specialised freedom of expression research outputs produced by the Organization. Instead, as detailed below, responsibility for reach is likely to fall to commissioned authors.

6.4.6 The role of social media in intergovernmental diplomacy and freedom of expression advocacy: “I find it just incredibly helpful in terms of learning what people on the ground are actually experiencing”

The advent of social media has transformed international freedom of expression advocacy and diplomacy. For UN Special Rapporteur David Kaye, Twitter is valuable as a tool for visible engagement with broad publics, to amplify his research and statements, and to draw connections between current issues and human rights norms in an unmediated manner. “It’s a lot easier than the mediated space of the traditional media,” he said.¹⁶⁹ He also uses the platform to monitor and track human rights abuses in States where data is difficult to access through official channels. This includes crowdsourcing context when he is researching cases. “I find it just incredibly helpful in terms of learning what people on the ground are actually experiencing,” he said, citing Kashmir as an example due to regular internet

¹⁶⁸ Research interview b) with Guy Berger 2018

¹⁶⁹ Research interview with David Kaye, 2018

shutdowns initiated by India in the region¹⁷⁰. Kaye told me that he understands UN Member States are paying attention to his Twitter commentary, despite not engaging directly with him via the platform. That's one of the reasons he leverages Twitter to influence public sphere debates, but he said this is also likely a factor contributing to increased sensitivities among States regarding public admonishment by the Special Rapporteurs. It's imperative to call out bad behaviour and model positive developments in the international human rights arena according to Kaye, but there's an essential tension associated with this strategy because "the State whose behaviour we hope will change may be more reluctant to publicly change its position in the face of what may be perceived as pressure," he said.¹⁷¹

Professor Kaye also highlighted the value of his Twitter activity in terms of visible engagement with civil society organisations – an important aspect of the role that he said he had not fully appreciated at the outset. Additionally, Kaye pointed to the purpose of his social media activity in the context of "meaningful public debates that could influence outcomes"¹⁷². While clearly underlining the effectiveness of active social media use in his work, Kaye acknowledged the increased workload it entails, and he was also cognisant of the risks. "The risk is being too quick to complain about state behaviour and getting it wrong, and that can undermine the credibility of the entire system. I think that can be very risky,"¹⁷³ he said. Kaye's realisation of some of the risks associated with realtime diplomacy in the context of 'networked freedom of expression' mirror the findings of my earlier research regarding journalists' initial uptake of Twitter and its evolving purpose as a tool for monitoring breaking news, crowdsourcing, audience development, content distribution, and public identity construction. The inherent risks I identified in 2009 included the 'speed imperative' associated with the medium that can lead to sharing inaccurate content with the associated risk of damaging credibility, impacts on verification norms and standards, and the time imposts associated with realtime audience engagement (c.f. Posetti, 2009a, 2010, 2013).

For Courtney Radsch, social media strategy is an essential component of CPJ campaigns. For example, the hashtag #RightToReport was deployed to help aggregate conversations around the 'Right to Report in the Digital Age' campaign and enlist the support of high-profile backers. I have devised and executed a range of social media campaigns connected to journalism and research projects since 2009, at the national and international levels. *In the case of Protecting Journalism Sources in the Digital Age*, for the purpose of building 'community around content' and amplifying the 'content made from process' (Posetti 2013), I used Facebook and Twitter extensively to 'go direct' to audiences (bypassing traditional gatekeepers) alongside my published reportage connected to the research. I used Instagram sparingly, in line with the need to differentiate the platforms according to the type of content available, and I avoided integrating other platforms due to capacity limitations. I deployed the hashtag #ProtectSources

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² Ibid

¹⁷³ Ibid

and it was well-adopted, trending in Australia at number three position on Twitter on the night of the national book launch in November 2017 mentioned earlier.

While being cautious not to engage in high-risk conversations – recognising the risks involving internet intermediary use highlighted by my UNESCO research – I connected with international journalists, NGOs, human rights defenders, media lawyers and academics working in the area of whistleblowing and source confidentiality from the time the research commenced in 2014. This strategy, which continues in the context of a research project devising new ethical guidelines and principles for journalists working with whistleblowers that I’m currently leading for Blueprint for Free Speech (Posetti 2018a)¹⁷⁴, was important in terms of sustaining interest in the research during the long wait for publication of the book in full. It also allowed us to plug the research into what Berger described as “hot issues” connected to the themes, and it led directly to invitations to speak at conferences and events about the research, including the preliminary launch at the Frontline Club in London. That invitation came via Facebook. This effort also paid off in connection with distributing the e-book once it was published.

I organised a ‘Facebook Live’ interview with UNESCO to mark the official launch of *Protecting Journalism Sources in the Digital Age* at the global World Press Freedom Day conference in Jakarta in May 2017. The archived video of that interview¹⁷⁵ has had over three and a half thousand views, while the post has been ‘liked’ 72 times and shared 18 times. Unfortunately, while Berger, Kaye and many other UN officials tweeted links to the book and associated stories, UNESCO’s official Twitter (@UNESCO) account failed to tweet it at all, perhaps indicating a disconnected distribution strategy within the Organization.

But the best indicator of digital reach and impact achieved by the book is probably this retweet¹⁷⁶ -from Edward Snowden himself:

¹⁷⁴ This project has since concluded with the publication of the *Perugia Principles for Journalists Working with Whistleblowers in the Digital Age* in five languages. English version available here: https://blueprintforfreespeech.net/wp-content/uploads/2019/01/Blueprint_Perugia_Principles.pdf


¹⁷⁵ Link to the Facebook video: <https://www.facebook.com/unesco/videos/live-interview-with-ms-julie-posetti-award-winning-australian-journalist-and-aca/10155294575148390/> [Accessed: 18/8/18]

¹⁷⁶ Link to original tweet: <https://twitter.com/julieposetti/status/858989797028667392> [Accessed: 18/8/18]



I was alerted to Snowden’s retweet announcing the book’s launch and linking to the e-book when my mobile phone began issuing incessant alerts via Twitter - a month after posting the original tweet, in which I’d tagged Snowden to draw his attention to the research. At the time of writing, the tweet had garnered 423,243 impressions (i.e. it was ‘seen’ by that many Twitter users), 300 likes, 280 retweets and – importantly, in terms of driving traffic to the book’s URL – 280 link clicks¹⁷⁷.

Tweet Activity

 <p>Julie Posetti @julieposetti New global @UNESCO study recommends reforms to defend source confidentiality against growing threats http://unesdoc.unesco.org/images/0024/002480/248054E.pdf ... #WPF2017 pic.twitter.com/Y5CQJK52NV</p>	Impressions	423,254
	Total engagements	1,959
	Detail expands	492
	Media engagements	452
	Likes	300
	Retweets	280
	Link clicks	280

But, arguably more significant than the reach of this post, was the symbolism of Snowden’s apparent endorsement of the study via a retweet. This was research produced for, and published by, the UN and his distribution of the study served to legitimise it in the eyes of privacy activists, members of digital rights and ‘hacktivist’ communities, investigative journalists and others who may have been sceptical about the research due the documented history of UN ‘Member States’ sensitivities and UNESCO cautiousness involving research publications.

¹⁷⁷ Note: These metrics are visible only to me as the Twitter account holder responsible for the original tweet. However, the image provided above is a screen grab of that detail.

This story also has a potent corollary – a personal anecdote that demonstrates a broader challenge when it comes to navigating freedom of expression in public, one underscored by UNESCO’s Berger regarding the difficulty of gaining traction for such complex issues. On the day my tweet was sent viral by Edward Snowden, my mother and sister were seated opposite me at my dining table. When I laughed in delight and surprise upon discovering the identity of the ‘influencer’ who had propelled my tweet, I said to them: “Oh my goodness! Edward Snowden just retweeted my book!” They both replied in unison: “Who’s Edward Snowden?”

6.5 Storytelling for freedom of expression: “Journalists in the US have realised that press freedom isn’t a given.”

Broader public awareness and engagement is critical to addressing persistent widespread ignorance and disinterest regarding issues like privacy, encryption, anonymity and their confluence with the sustainability of investigative journalism, and freedom of expression rights. These include: Journalists’ right to protect their sources; whistleblowers’ right to share information in the public interest; and the public’s right to access information. Explanatory journalism, audience engagement, accessible and relatable case studies, content that reaches people where they are most likely to find it, character-driven narratives and clarion communications adopting popular formats are essential to this process.

The historic reluctance of professional journalists to produce reflective practice for public consumption, and report on issues central to journalism – from the imprisonment and murder of journalists with impunity to the digital security threats undermining their work – persists. But according to CPJ’s Courtney Radsch, it began to give in the aftermath of the Snowden revelations. There has been significant movement, too, on coverage of journalism safety threats as journalists increasingly become targets of warlords, terrorists, corrupt government actors, and ‘strongman’ political leaders - with attacks on the rise in the developed West. This form of activist journalism in the US has become more prevalent in the Trump era, as Radsch explained: “Journalists in the US have realised that press freedom isn’t a given. It’s actually something that they need to be vigilant about.”¹⁷⁸ ¹⁷⁹ As Berger pointed out, the painstakingly balanced BBC is also now on the record as saying that they’re “neutral about everything except the safety of journalists”. But he said he still sees evidence of a reluctance to look ‘inwards’ on the part of the profession.

David Kaye echoed my own perspective and practice when he told me that it is really important to use specific stories and concrete examples to illustrate what’s at stake as a result of creeping threats of source protection erosion and the prospect of investigative journalism becoming unsustainable in the

¹⁷⁸ Research interview with Courtney Radsch, 2018

¹⁷⁹ See also: (Posetti 2017b)

Digital Age. “They’re extremely useful in giving people a firm example of where anonymity and confidentiality of sources really helped identify a major public policy problem, and did so very much in the public interest,” he said.¹⁸⁰

From the Pentagon Papers to Watergate, through to the *Boston Globe*’s investigations into child sexual abuse within the Catholic church and, more recently, the Snowden Files and the Panama Papers (*The Guardian* 2018), the characters and stories connected to acts of journalism based on confidential sources and information provided by whistleblowers have crossed the boundaries of strict non-fiction. They’ve also been treated as the sort of compelling, intriguing narratives that cross over into pop culture and are considered worthy of Hollywood blockbuster status such as *All the President’s Men* (1976), *Spotlight* (2015), *Snowden* (2016), *The Post* (2017), *The Laundromat* (forthcoming). While not all journalism dependent on confidential sources has a sexy backstory, the fact that films based on the most famous examples of such investigative reporting still find traction with large audiences is noteworthy when considering the potential value of reportage for mass audiences. If people flock to cinemas to see them, why won’t they read, watch, listen to them and like, share and comment on them if they’re told well, with human characters at the core, by the journalists who know them best?

6.5.1 Solidarity and loneliness: “For most of the time, I didn’t get much attention”

One such character is the prominent former *New York Times* journalist James Risen. Once *The Times*’ CIA correspondent and National Security Editor, he defied both the world’s most influential newspaper and consecutive US governments in a high-stakes struggle for independent journalism based on a confidential source. After working on the Snowden Files at *The Times*, he is now at The Intercept¹⁸¹ as Senior National Security Correspondent and director of First Look Media’s Press Freedom Defense Fund. In January 2018, he wrote his own story, which began like this:

I was sitting in the nearly empty restaurant of the Westin Hotel in Alexandria, Virginia, getting ready for a showdown with the federal government that I had been trying to avoid for more than seven years. The Obama administration was demanding that I reveal the confidential sources I had relied on for a chapter about a botched CIA operation in my 2006 book, “State of War.” I had also written about the CIA operation for the New York Times, but the paper’s editors had suppressed

¹⁸⁰ Research interview with David Kaye, May 2018

¹⁸¹ Note: The Intercept is the news website co-founded by the journalist first entrusted with Snowden’s leaks, Glenn Greenwald

the story at the government's request. It wasn't the only time they had done so.

(Risen 2018)

I interviewed Risen for this exegesis three months later, during the International Journalism Festival in Perugia, Italy. I had written about his case in *Protecting Journalism Sources in the Digital Age* - as I watched it progress through the courts. I had also requested an interview with him for the book, but he was embroiled in the legal tussle and facing the threat of jail for refusing to reveal his source/s at the time, so he understandably declined. It had taken nearly a decade of legal struggle to stave off attempts to compel Risen to reveal his source/s in connection with the leak investigation triggered by his 2006 book. The Bush administration began the battle, but by the time Risen was finally forced into court himself in January 2015, the Obama Administration had prosecuted three times as many leak cases involving journalists and whistleblowers as all previous administrations combined.

As I walked past the photographers into the courthouse that morning...I saw a group of reporters, some of whom I knew personally. They were here to cover my case, and now they were waiting and watching me. I felt isolated and alone. (Risen 2018)

Risen's sense of loneliness stemmed in part from the fact that he had been 'hung out to dry'¹⁸² by *The New York Times* and there was scant coverage of his years-long ordeal when he most needed journalism to serve him as the subject of a twisted story. By the time he took the stand to give evidence in 2015, then US Attorney General Eric Holder had begun to backtrack, in the face of public pressure and civil society activism, indicating that a reporter would not be forced to reveal a source on his 'watch' (Ellison 2015). But the damage had already been done, with a precedent set on appeal by the Obama administration that defeated the reporter's privilege in criminal cases in a district that was home to the Pentagon, the CIA, and the NSA. The Supreme Court ultimately refused to hear Risen's appeal, but he was winning another battle on the sidelines:

Even as I was losing in the courts, I was gaining ground in the court of public opinion. My decision to go to the Supreme Court had captured the attention of the nation's political and media classes. Instead of ignoring the case, as they had for years, the national media now framed it as a major constitutional battle over press freedom (Risen 2018).

That solidarity came too late, however. And in the end, the Justice Department successfully prosecuted the man they believed to be Risen's source for the book – Jeffrey Sterling – based on metadata connected to phone calls and emails between the two. Risen never confirmed if Stirling was his source, but the former CIA agent served two years in jail, regardless (Mass 2018), after the state accessed Risen's email metadata. To some observers, this was proof that compelling testimony from reporters

¹⁸² My interpretation of his treatment

may no longer be necessary to reveal a confidential source, just as Courtney Radsch had predicted in her interview with me for *Protecting Journalism Sources in the Digital Age* in late 2014. It also served to highlight the threats posed by data retention laws and the role of third-party intermediaries in digital era source protection erosion.

When he reflected on his case with me during our interview in Perugia, Risen came back to the theme of loneliness and the sense of abandonment by colleagues that he experienced during his long legal fight:

*It was very difficult over the years because it went on for so long. For most of the time I didn't get much attention. There was very little media coverage for many years. So, I felt lonely for a long time.*¹⁸³

He highlighted the need for news organisations to back their reporters in such cases. “Sometimes you don’t get a lot of support from your news organisation, and that’s a real problem,” he said. “Especially today, because of the costs involved, very few news organisations will fully back their reporters.”¹⁸⁴ Risen acknowledged that digital era threats to source protection require adoption of both analogue methods and high-tech defences: “We’re being forced to act like spies, having to learn tradecraft and encryption and all the new ways to protect sources.”¹⁸⁵ But he was clearly resentful of the need to do so, and also very clear that he wouldn’t sit in judgement on fellow reporters whose sources had been exposed by intelligence services. “You’re up against a massive machine,” he said. “I just don’t believe reporters should be criticised if the government still finds sources, because they have enormous power.”¹⁸⁶

6.5.2 Principles and guidelines for working with whistleblowers in the Digital Age: “*First, protect your sources*”

I am now collaborating with Risen and a group of twenty other international investigative journalists, editors and human rights defenders to develop a revised set of principles and guidelines for working with whistleblowers in the Digital Age – a project funded by the Open Society Foundations (OSF) and commissioned by the NGO Blueprint for Free Speech. Following our interview, I co-anchored a research roundtable with Risen in Perugia, where the group reviewed the draft principles (Posetti 2018a) I had devised for the project. So urgent is the issue, and so intense was the conversation, that they insisted on continuing for an hour longer than scheduled.

¹⁸³ Research interview with James Risen, recorded in Perugia, Italy, April 2018

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ Ibid

These were the draft principles that emerged from this process of collaborative refinement:

1. First, protect your sources
2. Recognise the costs of whistleblowing for the whistleblower
3. Defend anonymity when it is requested
4. Undertake a digital risk assessment on every story involving a confidential source or whistleblower
5. Take responsibility for your digital defence and data hygiene
6. Embrace and use encryption
7. Defend encryption as a human right connected to freedom of expression and access to information
8. On sensitive stories, train your whistleblowers in basic digital security with regard to 'data at rest'
9. On sensitive stories, train your whistleblowers in basic digital security with regard to 'data in transit'
10. Publish original documents where possible and safe to do so
11. Recognise the importance of data sets as 'stories'
12. Publish the data sets in their entirety where resources permit and it is safe to do so
13. Delete data provided by sources, when asked to protect the sources, consistent with ethical, legal and employer obligations
14. Delete data that you no longer need, and do it securely
15. Ensure any digital drop boxes for sources and whistleblowers offer a good level of security, and, for high-risk materials, anonymity and security
16. Verify material focusing on the public interest value of the information, not on your view of the attitudes or opinions of the source or whistleblower
17. Actively encourage your organisation to provide proper data security for journalists, sources and stored materials, along with appropriate training for journalists
18. For high risk whistleblowers, prompt them to think through how they will cope when the story breaks, ahead of time
19. Understand the country, regional and international legal and regulatory frameworks for protecting confidential sources and whistleblowers
20. Explain the risks of digital exposure to your sources/whistleblowers in line with your ethical obligations to protect them

The reporters, editors and human rights defenders in that conference room were clearly invested in the issues and recognised the importance of reportage on the theme, along with the associated value in broader public conversation about the intersecting issues. Importantly, they also found Risen's story compelling. The next phase of this project involves researching and elaborating on these draft principles

which will be published in a handbook at the end of 2018¹⁸⁷.

6.5.3 Implications for development of a hybrid model to negotiate freedom of expression in public: “It’s a debate that has to happen in public, not just in litigation”

UN Special Rapporteur David Kaye told me that he sees “total value in a public discussion”¹⁸⁸ about the erosion of source confidentiality in the post-Snowden era because governments and prosecutors are clearly influenced by public opinion, and where there is a strong consensus on the value of independent public interest journalism that protects sources, it has an important impact on judges too:

*So, it’s a debate that has to happen in public, not just in litigation. If you do it just in litigation, it becomes a kind of technical issue and I think these things should be seen bigger public issues about the health of our democracy, rather than just ‘person x deserves to protect her source’*¹⁸⁹

While recognising the value of mainstream media coverage and social media amplification of *Protecting Journalism Sources in the Digital Age* in terms of educating journalists and potential sources, helping to activate civil society, and promoting a knowledge resource that might aid lawyers and influence legislators and policy makers, UNESCO’s Guy Berger remained unconvinced about the viability of achieving broad public conversations about such complex and “niche” research.

Nevertheless, Berger told me that he planned in future to make it a clause in commissioned authors’ contracts that they would be responsible for promoting their work for UNESCO because: “If you hadn’t promoted this [*Protecting Journalism Sources in the Digital Age*] as much as you did, we wouldn’t have had nearly as much promotion.”¹⁹⁰ That’s a strategy that makes sense for a resource-stretched Division frequently entering into partnerships with civil society organisations that have a journalism advocacy remit and capacity to build powerful narratives around research. But I would go further and suggest that UNESCO develop a model of project ‘linkage’ partners to support such a process in the context of freedom of expression research. This could involve projects designed to partner academic researchers with civil society organisations and a media outlet, with a view to leveraging the input of a range of communities with specialist knowledge and facilitating broad public conversation around the research. Similar models already exist within the realm of national research funding frameworks in several countries.

¹⁸⁷ This project has since concluded with the publication of the *Perugia Principles for Journalists Working with Whistleblowers in the Digital Age* in five languages. English version available here:

https://blueprintforfreespeech.net/wp-content/uploads/2019/01/Blueprint_Perugia_Principles.pdf

¹⁸⁸ Research interview with David Kaye, 2018

¹⁸⁹ Ibid

¹⁹⁰ Research interview c) with Guy Berger, 2018

6.6 Conclusion and summary

In this narrative non-fiction account, drawing on Critical Reflective Practice and analytic autoethnography, I have interwoven my own story of the production of *Protecting Journalism Sources in the Digital Age*, with the experiences and reflections of four key informants: the Director of the UNESCO division who commissioned the major artefact; the UN Special Rapporteur with responsibility for promoting and defending freedom of expression internationally and doing the “naming and shaming” that many UN agencies seek to avoid; a civil society activist and former UNESCO employee who shared rare and valuable ‘insider’s’ insights; and finally a crusading journalist who has himself been a victim of source protection erosion and the profession’s failure to publicly defend its own in this territory. This is what I call a ‘cooperative deconstruction’¹⁹¹.

I must also convey my own self-assessment: while I regret allowing frustration to bubble over at times during the research and production of the UNESCO study, I believe I worked as hard as I could, and to the best of my capacity to lead a high-impact piece of international policy research to fruition. I learned much – both about my own capacities and limitations, and the centrality of relationship-building and maintenance to the successful execution of high-intensity research projects. But most importantly, I acquired significant expertise on some of the most pressing issues confronting 21st century investigative journalism, along with a passion to continue researching and reporting on these themes. This ultimately led to my conceptualisation of ‘networked source protection’, and the development of an intersectional model of policy development, advocacy and journalism appropriate for negotiating freedom of expression in the networked public sphere, as outlined in this exegesis.

Intergovernmental politics, frustrating UN bureaucracy, and diplomatic ‘sensitivities’ notwithstanding, I remain proud of *Protecting Journalism Sources in the Digital Age* and pleased with what it has achieved to date. I hope that it has a long and meaningful shelf-life but, moreover, that it inspires future scholarship, freedom of expression activism, and journalism about the pressing issues it addresses. I feel honoured to have worked with talented, committed colleagues within UNESCO, the academy, and WAN-IFRA/The World Editors Forum to bring the project underpinning my PhD dissertation to eventual fruition.

¹⁹¹ Note: my deployment of the terms ‘cooperative deconstruction’, ‘collaborative deconstruction/reconstruction’, ‘interactive unpacking’ and ‘negotiated memory’ does not indicate a willingness on behalf of Berger or other interviewees to self-identify as contributors to these processes and/or outcomes. The interviewees do not have co-responsibility for my analysis and conclusions, nor do they necessarily agree with them.

Chapter 7: Conclusions and Recommendations

7.1 Conclusion

This action research-modelled exegesis (Phillips 2014) has provided detailed critical and scholarly context for the commissioning, production, dissemination and impact of my study for UNESCO, *Protecting Journalism Sources in the Digital Age* (Posetti 2017a). This has been achieved through an analytical interweaving of academic research with high-level industry and NGO-commissioned reports on the themes at the heart of the book, and key original research findings and recommendations drawn from my study. This approach is complemented by a narrative non-fiction inspired Critical Reflective Practice (C.f. Niblock 2007; Fook 2007; Fook & Askeland 2009; Lawrence 2011; Burns 2013) account which uses elements of analytic autoethnography (Anderson 2006) to synthesise my experiences of producing the major artefact, and learnings from the project, with field observations, reportage, and a process I'm calling 'cooperative deconstruction'.

As I have argued, this PhD project, comprising the UNESCO-published book (the major artefact) and its multiple associated outputs and events, along with this exegesis, highlights development of an intersectional model of policy development, advocacy and journalism for the negotiation of freedom of expression rights in public. The study undertaken at the heart of this project entailed: peer-reviewed research on a global scale; journalistic methods and outputs; political communication and diplomacy; audience engagement, and the leveraging of a networked public sphere as components of Participative Action Research which did not end at the point of publication. This exegesis is, in fact, another component of an unfolding process.

The major artefact¹⁹² was produced through a series of overlapping, rigorous research methods common to both journalism and academic policy research (and intensified in the context of sensitive UN geopolitics and associated verification demands), but these traditional methods were enhanced by connective and participatory strategies which sought to 'make content out of process' and simultaneously build engaged audiences to enhance the impact of the study. This connective process also underpins the methodology of this exegesis (Hamilton & Jaaniste 2010; Lindgren & Phillips 2011) in both situating the work of the project in a broader scholarly context, and through its unique approach to what I call 'cooperative deconstruction' employed as part of the critical reflective process. To this end, I have interwoven my own Critical Reflective Practice 'story' of the production processes with the experiences and reflections of four key informants: the UNESCO Director who commissioned this

¹⁹² See Appendix 9.2 for a PDF version of *Protecting Journalism Sources in the Digital Age*

research (Dr Guy Berger); a UN Special Rapporteur with responsibility for promoting and defending freedom of expression internationally and doing the “naming and shaming” that many UN agencies seek to avoid (Prof. David Kaye); another, who is both a civil society activist and former UN employee who shared rare and important insights (Dr Courtney Radsch); and finally a crusading journalist who has himself been a victim of source protection erosion and the profession’s failure to publicly defend its own in this territory (James Risen).

The ultimate aim of the exegetical component is to reflect on and aid the future navigation and negotiation of freedom of expression advocacy through high-impact research undertaken by academics, journalists, intergovernmental organisations and civil society groups. The PhD project as a whole, serves as an intervention in support of protecting confidential sources, recognised as a central tenet of journalism practice and essential to the sustainability of investigative journalism, at time when the practice of accountability journalism globally is facing unprecedented Digital Age threats and myriad other converging pressures.

7.1.1 Introducing the concept of ‘networked source protection’

The additional research undertaken for this exegesis, via a review of extensive academic, civil society and industry research relevant to digital safety and security issues intersecting with legal and normative frameworks designed to support the principle of source protection (published up to August 2018), has allowed me to demonstrate that the trends identified in *Protecting Journalism Sources in the Digital Age* have, in fact, become more entrenched and increasingly global in their manifestation since the book was submitted to UNESCO for publication in mid 2015. (c.f. Bell & Taylor 2017; Bradshaw 2017; Carter 2017; Couldry 2017; Eide 2016; Eide & Kunelius 2018; Fernandez 2017; Glowacka et al 2018; Heikkila 2016; Heikkila & Kunelius 2017; Gardner 2016; Kaye 2015b; MacGregor et al 2016; MacGregor et al 2017; Nolan 2015; Rogers & Eden 2017; Townend & Danbury 2017; Walker 2017; Wasserman 2017) In combination with critical analysis of convergent theories on ‘advocacy journalism’ (Harcup 2005; Waisbord 2008) ‘activist journalism’ (Russell 2016; Barnard 2017), ‘networked journalism’ (Beckett 2008), digital citizenship (Hinz & Brown 2017), and the concepts of ‘networked press freedom’ (Annany 2018) and audience-inclusive media freedom (Reid 2015), this assessment has led me to propose the notion of ‘networked source protection’.

This concept can be understood as a form of participative source protection, one which: recognises the shared responsibilities for defensive digital security tactics between journalists, news publishers, confidential sources and whistleblowers; requires adjustment of professional journalism ethics in response to Digital Age source protection erosion which makes promising confidentiality increasingly difficult; accepts the need for journalists to educate and train their sources in good digital hygiene

practices to improve their capacity to make secure contact and protect their identities; understands the capacity of journalism to help inoculate the 'herd' (i.e. broader society) against the effects of mass surveillance, data retention and national security overreach, along with the benefits of encryption, through engaging reportage and storytelling about the issues.

7.1.2 Realpolitik and UNESCO's fraught history of freedom of expression research

I have argued that the production of *Protecting Journalism Sources in the Digital Age* was undertaken in the context of a difficult and protracted history of conflict and controversy connected to UNESCO-commissioned research on freedom of expression issues (Nordenstreng 1999, 2012, 2013; McKenna 2013; Hackett 2013). It is noteworthy that up until undertaking the detailed historical analysis presented in this exegesis, I was unaware of the depth and contemporary resonance of UNESCO freedom of expression research controversies. Analysing this history has provided new insights into the tensions and boundary work required for the type of research undertaken by this project.

However, as my paper with Dr Julie Reid (2017) concluded, it is quite important to note that these challenges are by no means insurmountable, nor do they negate the purposefulness of embarking upon such research for UNESCO. The hurdles are navigable if:

... a process of open and transparent communication is adopted by UNESCO [and contracted researchers], acknowledging such potential obstacles and fostering trust between the parties; a collaborative approach to problem solving and work flowing from review processes is embraced by UNESCO officers and the researcher/s; there is understanding and acceptance that budgets and resources necessarily contain the scope of research; and if the concerns of researchers are taken seriously by UNESCO [and the context of the research is understood by the researchers].
(Reid & Posetti 2017)

It is also worth acknowledging that the high bar for information verification set by UNESCO encourages rigorous research standards. Similarly, despite the difficulties identified in adequately mapping trends in freedom of expression and media development globally, UNESCO's insistence upon equitable regional representation in research scope, and gender balance within research teams and research subjects, mandates diversity in ways that few other organisations or funders require. Noteworthy too, are the prestige and potential global impact of UNESCO research commissions in the realm of freedom of expression and media development – they may be problematic to undertake, but they can also be high-impact, meaningful and worthwhile, aiding UNESCO's important work on safety of journalism issues at

the international level.

7.1.3 Implications for UNESCO

Based on the original research and critical analysis undertaken for this exegesis, I have concluded that it is time for UNESCO to consider a 'separation of church and state', or a 'shield' between commissioned researchers and authors, UNESCO subject matter experts, and the political hierarchy of the Organization – especially in the area of freedom of expression. This could help to ensure the independence of its research to enable defence of the integrity and credibility of such research into the future in the context of concerns about 'censorship'. Such a model was proposed by former UNESCO employee Dr Courtney Radsch in a research interview for this exegesis. It could involve, for example, an external panel of experts (with rotating membership, including academics and civil society representatives) appointed by UNESCO to peer review research publications with a mandate to approve publication (without necessity for sign off by the Director-General) and provide an avenue for dispute resolution in problematic cases.

To address the potential for tension and conflict connected to UNESCO's collaborations with consultant researchers and partner organisations, in part caused by concerns about the implications of geopolitics on research outputs, improved communications with collaborators focused on explicating specific UNESCO requirements and processes would be beneficial. This could involve transparency about geopolitical realities and political sensitivities as they affect qualitative research, and a process of education about the complex and fraught history of the Organization's research in the freedom of expression domain, in order to provide important contextual understanding for contemporaneous sensitivities and interventions.

UNESCO-commissioned research in the freedom of expression and media development space would also benefit from increased budgets and resourcing to enable appropriate funding of valuable research projects central to defending core rights enshrined in the Universal Declaration of Human Rights, particularly in the context of attacks on such rights in Western democratic settings as populism and neo-fascism spread. Alternatively, reducing the number of commissioned research projects to enable more sustainable practices in the context of contracting budgets might be necessary. Similarly, funding models that are adjustable for contingencies in the case of important research undertaken on emerging issues at critical times, that may grow in complexity as the research unfolds, would be advantageous. Additionally, the resourcing of research projects needs to incorporate capacity for diplomatic engagement with UNESCO Member States, their legislators and policy-makers, to ensure practical tools emerging from the research, such as the 11-point model framework for legal source protection benchmarking presented in *Protecting Journalism Sources in the Digital Age*, can find impact and traction. Finally, on funding issues, UNESCO's freedom of expression research would benefit from

budget allocations connected to the training and development of key actors targeted through the research, such as journalists, civil society organisations, law enforcement agencies and the judiciary.

With regard to impact, the Freedom of Expression and Media Development Division's approach to the distribution of commissioned research and audience engagement connected to it could also be improved through capacity building and embedding integrated communications strategies incorporating a 'networked' approach to commissioning, production and dissemination.

7.1.4 Implications for UNESCO-commissioned researchers

There are parallel responsibilities for UNESCO-commissioned researchers and civil society organisations to consider based on this exegetical analysis. Firstly, they need to be aware of the complexities of undertaking research for intergovernmental organisations – particularly where Member States are involved as primary stakeholders. Invariably, such projects will involve frustrating bureaucratic processes, serious realpolitik, and very high standards regarding compliance with Organizational style, verification, gender diversity and regional representation. This requires a preparedness for flexible, adaptable, collaborative approaches to the work, and clear communication about capacity limitations, misunderstandings, and knowledge gaps from the outset. To this end, contracted researchers should ensure that they keep UNESCO staff informed, in writing, if and as the project escalates in complexity, sensitivity, or difficulty. This might entail going higher in the Organizational structure for clarity, as and when required. Researchers have a responsibility to insist on open/responsive communications and be prepared to reciprocate as required. They would also benefit from 'self-education' regarding the history and impact of UNESCO research in the freedom of expression realm.

It is also important to keep sight of the 'big picture' in the context of bureaucratic obstacles and geopolitical sensitivities: the end goal can be meaningful freedom of expression research with real policy impact and widespread public knowledge-sharing. Part of this process should involve recognising that UNESCO staff are frequently under-resourced and overloaded, which limits their capacities.

7.1.5 Implications for the journalism profession

There are significant implications for journalism and journalists flowing from this PhD project. These include the recommendations from the major artefact pertaining to the need to renovate ethical principles and investigative journalism practices associated with confidential sources and whistleblowers to ensure they're fit for the Digital Age (Banisar 2007, 2008; Paliwala 2013; Heikkila & Kunelius 2017; Lashmar 2017; Carter 2017; Bradshaw 2017; McGregor et al 2017, 2017). Additionally, there is a need to consider the idea of 'networked source protection' as conceptualised in this exegesis – involving

recognition of the shared responsibility for training, education, and knowledge-sharing in the context of Digital Age source protection erosion and networked publics.

It is now time for professional norms and values to accommodate activist and explanatory approaches to freedom of expression issues in the interests of sustaining ongoing public debate central to the defence of open societies, and the future of accountability journalism that is dependent upon confidential communications with sources and whistleblowers. This involves appreciation that a range of 'journalisms' on the 'advocacy continuum' (Harcup 2005; Fisher 2016) can aid journalism about freedom of expression issues, including the human rights to privacy and encryption, and reportage on journalism safety and the murder of journalists with impunity.

Similarly, audiences need to be involved in the co-production of freedom of expression rights which are shared, especially in the 'networked press freedom' era, recognising that media freedom now needs to be understood as a collaborative process that acknowledges audience engagement and rights (Reid 2015). Reportage about these themes that deploys storytelling devices such as 'lived experience' case studies designed to humanise complex technical issues connected to source protection erosion and the right to encrypt, can help deepen impact and broaden community education.

One approach could involve considering the value of UNESCO-commissioned research projects as knowledge resources, and reporting on the potential implications at the international, regional and State levels. In particular, consideration could be given to undertaking a review of States' performance against the 11-point framework contained in *Protecting Journalism Sources in the Digital Age*. Importantly, journalists and news organisations can be aided in holding States *and* the UN accountable regarding responsibilities for practicing, maintaining, and strengthening international freedom of expression rights by leveraging UNESCO-commissioned research like the major artefact.

7.1.6 Implications for the academy

This PhD project has the potential to inspire academic research that progresses the work at the core, mapping Digital Age threats to source protection frameworks internationally. This could involve research collaborations with journalists, news outlets, and civil society organisations to periodically update the status of legal source protection frameworks, demonstrating the intersections with a range of other Digital Age issues, including national security overreach, mass surveillance and data retention/handover. Alternatively, such collaborative research groups could assess individual countries' legal and normative source protection frameworks (or lack thereof) against the 11-point model presented in *Protecting Journalism Sources in the Digital Age* within their regions.

But this body of work also highlights an opportunity to research the lived experience of whistleblowers

and journalists' confidential sources in the Digital Age. In the context of a 'networked public' model, the rights and protections of sources and journalists must inevitably be considered and researched together in the context of 'networked source protection'.

In summary: collaboration and strategic cross pollination of ideas and actors; engaged social media practice; activist journalism and hybrid models of advocacy are essential elements for the navigation and public negotiation of freedom of expression rights in the 'networked press freedom era'. So, too, are well-informed interactive publics, independent research and explanatory journalism, and increasing the capacity of UNESCO to commission and produce world-class, well-resourced international research on freedom of expression and media development that has the potential to impact on States, regional intergovernmental organisations and courts. Central to this goal are increased funding and resources for UNESCO's critically important role in freedom of expression research and knowledge sharing, especially regarding journalism safety and security, and improved capacities within UNESCO's Freedom of Expression and Media Development Division for project management, audience development, and strategic communications practices. More pertinent still, might be organisational review and reform to ensure the independence and ongoing credibility of UNESCO research publications in this space, including consideration of Dr Courtney Radsch's recommendation for the provision of a 'shield' to defend such work against undue political interference and/or hypersensitivities.

Finally, I would like to repeat that the mission of UNESCO freedom of expression research remains noble and relevant. As Berger (2013) noted: "The 2011 Resolution behind the research [*World Trends* 2014]...also included a clause that referred to reinforcing the need for UNESCO to promote the free flow of ideas by encouraging dialogue between Member States and by sensitizing governments, public institutions and civil society to strive towards freedom of expression and freedom of the press as a central element in building strong democracies...." (Berger 2013 p.141)

7.2 Recommendations¹⁹³

Drawing on research for this exegesis, and reflecting on the major artefact, I have aggregated a set of recommendations relevant to:

- UNESCO
- UNESCO-commissioned researchers
- The journalism profession
- The academy as it engages with UNESCO research

¹⁹³ These recommendations should be read in conjunction with the recommendations from *Protecting Journalism Sources in the Digital Age* found on pp 137-139 of Appendix 9.2 attached to this exegesis

These recommendations are explicated in the conclusion above, but they are also curated below in bullet-point form to facilitate clarity and accessibility.

7.2.1 Recommendations for UNESCO

- UNESCO-commissioned research in the freedom of expression space would benefit from:
 - Introduction of a research publishing model designed to ‘separate church and state’ (i.e. commissioned researchers, internal Subject Matter Experts, and UNESCO political review processes) or create a ‘shield’ for commissioned researchers/authors and SMEs to protect them from overt interference by the Organization’s political hierarchy in research production and publication processes. This could enable defence of the integrity and credibility of such research into the future
 - A structural review of UNESCO research commissioning/publication processes focused on achieving the outcomes identified directly above
 - Increased budgets and resourcing to enable appropriate funding of valuable research projects central to defending core rights enshrined in the Universal Declaration of Human Rights, especially as they relate to journalism safety and security
 - Funding models that are adjustable for contingencies in the case of important research undertaken on emerging issues at critical times that may grow in complexity as the research unfolds
 - Increased capacities for strategic, audience-engaged communications connected to research outputs and related publications
 - Embedding integrated communications strategies incorporating a ‘networked’ approach to commissioning, production and dissemination e.g. UNESCO could develop a model of project ‘linkage’ partners to support freedom of expression research. This could involve projects designed to partner academic researchers with civil society organisations and a media outlet, with a view to facilitating broader traction for its research outputs
- UNESCO’s collaborations with consultant researchers and partner organisations could benefit from:
 - Improved communications with researchers, focused on explicating specific UNESCO requirements/processes
 - Transparency about geopolitical impacts/political sensitivities

- A process of education about the complex and fraught history of the Organization's freedom of expression research, in order to provide important contextual understanding for contemporaneous sensitivities and interventions
- The resourcing of research projects needs to incorporate capacity for diplomatic engagement with UNESCO Member States, their legislators and policy-makers, to ensure tools such as the 11-point model framework presented in *Protecting Journalism Sources in the Digital Age* can find impact and traction
- UNESCO's freedom of expression research with would benefit from budget allocations connected to the training and development of key actors targeted through commissioned research

7.2.2 Recommendations for UNESCO-commissioned researchers

- Be aware of the complexities of undertaking research for intergovernmental organisations – particularly where Member States are involved. Invariably, such projects will involve frustrating bureaucratic processes, serious realpolitik, and very high standards regarding compliance with organisational style, verification, gender diversity and regional representation
- Expect to confront a steep 'learning curve' and the need for acculturation if you're a first-time UNESCO-commissioned researcher. Self-education about UNESCO processes, politics, and the history of commissioned research in the area will likely be necessary
- Be prepared to be flexible, adaptable, collaborative, and clear about capacity limitations/misunderstandings/knowledge gaps from the outset
- Ensure that you keep UNESCO staff informed, in writing, if/as the project escalates in complexity, sensitivity, or difficulty, and go higher in the Organizational structure for clarity as/when required
- Do not lose sight of the 'big picture' in the context of bureaucratic obstacles and geopolitical sensitivities: the end goal can be meaningful freedom of expression research with policy impact and valuable public knowledge sharing
- Recognise that UNESCO staff are frequently under-resourced and overloaded, limiting capacities
- Insist on open/responsive communications and be prepared to reciprocate as required

7.2.3 Recommendations for the journalism profession

- Recognise the need for training, education, and knowledge-sharing in response to ‘networked source protection’ requirements (e.g. changes in practices regarding communications with confidential sources and whistleblowers; shifting ethical standards and principles)
- Recognise the need to report in an activist and explanatory manner around freedom of expression issues to sustain ongoing public debate around these issues in the interests of defending open societies and the future of journalism
- Engage audiences in the co-production of freedom of expression rights which are shared, especially in the ‘networked press freedom’ era, recognising that press/media freedom now needs to be understood as a collaborative process involving audience engagement and rights
- Appreciate that a range of ‘journalisms’ on the ‘advocacy continuum’ can aid journalism about freedom of expression issues, including the human rights to privacy and encryption, and reportage on journalism safety/the murder of journalists with impunity
- Use reportage and storytelling devices such as ‘lived experience’ case studies to humanise complex/technical issues connected to source protection erosion and the right to encrypt to help inoculate the ‘herd’.
- Consider the value of UNESCO-commissioned research projects as knowledge resources, and report on the potential implications at the international, regional and State levels. In particular, consider undertaking a review of States’ performance against the 11-point framework contained in *Protecting Journalism Sources in the Digital Age*
- Hold States *and* the UN accountable regarding international freedom of expression rights – using UNESCO-published research as part of the process

7.2.4 Recommendations for the academy

- Academic researchers have an opportunity to research the lived experience of whistleblowers and journalists’ sources in the Digital Age. In the context of a ‘networked public’ model, the rights and protections of sources and journalists must inevitably be considered and researched together in the context of ‘networked source protection’
- Journalists, academics and civil society organizations could collaborate on assessments against the 11-point framework proposed in *Protecting Journalism Sources in the Digital Age* within their regions.

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Appendices

Appendix 1: Situating *Protecting Journalism Sources in the Digital Age* on an international timeline of source protection relevant actions and project impacts (2013-2018)

The purpose of the timeline that follows is to demonstrate the evolution, trajectory and impact of the book. It situates the major artefact connected to this exegesis, *Protecting Journalism Sources in the Digital Age* (appended to this exegesis as Appendix 9.2), and its associated suite of secondary artefacts, including reportage, social media engagement, and events (see exemplars in the introduction at) within the recent history (2013-2018) of international developments in the normative and legal frameworks that defend source confidentiality as an essential freedom of expression right.

Collectively positioned on this timeline, these artefacts work as a chronological visualisation of the intersectional model for negotiating freedom of expression in public that my PhD project produced as an act of Participatory Action Research.

The timeline begins with the Report to the UN Human Rights Commission from the former UN Special Rapporteur Frank La Rue that underpinned UN responses to the Snowden revelations, ultimately leading to the commissioning of *Protecting Journalism Sources in the Digital Age*

Impact Timeline 2013-2018¹⁹⁴

- ***June 2013: ‘Report of the Special Rapporteur (Frank La Rue) on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ to the Human Rights Council (A/HRC/23/40)***

This Report states: “Journalists must be able to rely on the privacy, security and anonymity of their communications. An environment where surveillance is widespread, and unlimited by due process or judicial oversight, cannot sustain the presumption of protection of sources”. It further notes: “States cannot ensure that individuals are able to freely seek and receive information or express themselves without respecting, protecting and promoting their right to privacy.” (UN HRC 2013)

¹⁹⁴ Note: some of these timeline entries are drawn directly from *Protecting Journalism Sources in the Digital Age* (Posetti 2017a).

- **July 2013:** UN High Commissioner for Human Rights, Navi Pillay spotlighted the right to privacy in protecting individuals who reveal human rights implicated information

In the aftermath of Snowden's revelations, Pillay said: "[Edward] Snowden's case has shown the need to protect persons disclosing information on matters that have implications for human rights, as well as the importance of ensuring respect for the right to privacy." She added that national legal systems must ensure avenues for individuals disclosing violations of human rights to express their concern, without fear of reprisals.

Pillay declared that the right to privacy, the right of access to information, and freedom of expression are closely linked. "The public has the democratic right to take part in public affairs and this right cannot be effectively exercised by solely relying on authorized information."

This point is relevant to source protection because much investigative journalism is dependent upon 'unauthorised' sources - that is, sources who have not been cleared by government, organisational or corporate agencies to comment.

Pillay also explicitly pointed to the need for people "to be confident that their private communications are not being unduly scrutinised by the State". (UN News 2013b)

- **November 2013:** *37th session of the UNESCO General Conference passes a Resolution on 'Internet-related issues: including access to information and knowledge, freedom of expression, privacy and ethical dimensions of the information society'*

This resolution formally recognised the value of investigative journalism to society, and the role of privacy in ensuring that function. "... (P)rivacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law, and that such privacy should not be subject to arbitrary or unlawful interference," the resolution states in part (UNESCO 2013). It is this resolution that mandated the commissioning by UNESCO of the report 'Internet Study: Privacy and Journalists' Sources'. That report ultimately became the book at the core of this exegesis: *Protecting Journalism Sources in the Digital Age*

- **December 2013:** *United Nations General Assembly (UNGA) adopted a resolution on the Right to Privacy in the Digital Age (A/RES/68/167)*

Resolution 68/167 was co-sponsored by 57 Member States and it called upon all States to "...respect and protect the right to privacy including in the context of digital communication. ... To take measures to put an end to violations of those rights and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law". (UNGA 2013a)

The Resolution expressed 'deep concern' "...at the negative impact that surveillance and/or interception of communications, including extraterritorial surveillance and/or interception of communications, as well as the collection of personal data, in particular when carried out on a mass scale, may have on the exercise and enjoyment of human rights".

It also called upon States: "To review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law" and "To establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data," emphasising the need for States to ensure the full and effective implementation of their obligations under international human rights law.

- **February 2014: the UN hosted an international expert seminar on the Right to Privacy in the Digital Age (Geneva)**

During this seminar, Frank La Rue (then UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), called for a special United Nations mandate for protecting the right to privacy. "Privacy and freedom of expression are not only linked, but are also facilitators of citizen participation, the right to free press, exercise of free opinion, and the possibility of gathering individuals, exercising the right to free association, and to be able to criticise public policies."

- **February 2014: Collaboration begins on source protection research with UNESCO's Director of Freedom of Expression and Media Development, Dr Guy Berger**

As WAN-IFRA and World Editors Forum Research Fellow and Editor, I interviewed Berger for a story about a major research project UNESCO was commencing on online privacy and freedom of expression, with a view to engaging international editors and investigative journalists in the research. I published the story with the headline UNESCO calls for editors' input in online privacy study (Posetti 2014)

- **March 2014: UNESCO World Trends in Freedom of Expression and Media Development report published**

The threat posed to journalism by mass surveillance was underlined in this inaugural edition of UNESCO's flagship global report edited by one of my interviewees for both *Protecting Journalism Sources in the Digital Age* and this exegesis: Dr Courtney Radsch (then with UNESCO). It highlighted the role of national security, anti-terrorism and anti-extremism laws as instruments "...used in some cases to

limit legitimate debate and to curtail dissenting views in the media, while also underwriting expanded surveillance, which may be seen to violate the right to privacy and to jeopardize freedom of expression”.

This report further noted that:

National security agencies across a range of countries have gained access to journalists’ documents, emails and phone records, as well as to massive stores of data that have the potential to enable tracking of journalists, sources and whistleblowers. (UNESCO 2014c)

- ***April 2014: European Union Court of Justice judgement (Ireland Data Retention Directive)***

In its judgment declaring the Data Retention Directive invalid, the Court observed that communications metadata “taken as a whole may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained”. (Digital Rights Ireland Ltd C-293/12 v Minister for Communications et al Ireland, 8 April 2014, Directive 2006/24/EC) This judgement is significant in relation to the role of metadata in identifying confidential sources and the threat posed by data retention to source protection.

- ***April 2014 Declaration of the Committee of Ministers, Council of Europe (COE) on the protection of journalism and safety of journalists and other media actors adopted:***

This Declaration stated: A favourable environment for public debate requires States to refrain from judicial intimidation by restricting the right of individuals to disclose information of public interest through arbitrary or disproportionate application of the law, in particular the criminal law provisions relating to defamation, national security or terrorism. The arbitrary use of laws creates a chilling effect on the exercise of the right to impart information and ideas and leads to self-censorship. Furthermore, the Committee of Ministers also directly addressed the implications of mass surveillance for source protection: “Surveillance of journalists and other media actors, and the tracking of their online activities, can endanger the legitimate exercise of freedom of expression if carried out without the necessary safeguards, and it can even threaten the safety of the persons concerned. It can also undermine the protection of journalists’ sources.” The Committee also agreed to consider further measures regarding the alignment of laws and practices concerning defamation, anti-terrorism and protection of journalists’ sources with the European Convention on Human Rights.

- ***May 2014: I enter discussions with UNESCO’s Director of Freedom of Expression and Media Development about producing research on the issues pertaining to journalism ‘post-Snowden’¹⁹⁵***

¹⁹⁵ Private email correspondence with Dr Guy Berger.

These discussions occurred in the context of my editorship of the flagship WAN-IFRA/World Editors Forum report *Trends in Newsrooms 2014* which included a chapter on investigative journalism post-Snowden (Posetti 2014c)

- **May 2014 *Stichting Ostade Blade v The Netherlands in the ECtHR* (Application no. 8406/06)**

In this case, the Court rejected a Dutch magazine's application against a police raid under Article 10 of the European Convention on Human Rights. This judgement demonstrates the narrow circumstances in which source protection laws can be legitimately over-ridden in the public interest. The magazine's informant (a person who made a bomb threat in a letter published by the magazine) was not motivated by the desire to provide information which the public were entitled to know, according to the Court. According to the judgement: "his purpose in seeking publicity through the magazine *Ravage* was to don the veil of anonymity with a view to evading his own criminal accountability".

- **May 2014: Council of the European Union - EU Human Rights Guidelines on Freedom of Expression: Online and Offline**

These guidelines included the following pertinent statements: "States should protect by law the right of journalists not to disclose their sources in order to ensure that journalists can report on matters in the public interest without their sources fearing retribution. All governments must allow journalists to work in a free and enabling environment in safety and security, without the fear of censorship or restraint." The EU will "support the adoption of legislation that provides adequate protection for whistle-blowers and support reforms to give legal protection to journalists' right of nondisclosure of sources".

- **June 2014: I launched a WAN-IFRA/World Editors Forum survey on the impacts of mass surveillance on investigative journalism during a panel discussion with UNESCO's Director of Freedom of Expression and Media Development Guy Berger at the World News Congress in Turin¹⁹⁶**

This survey, originally intended to feed UNESCO's overarching 'internet study', later fed the data corpus for *Protecting Journalism Sources in the Digital Age*, which in turn informed the overarching UNESCO study. I wrote a story for WAN-IFRA about the research to begin the process of engaging potential participants and 'making content out of process': *One Year on: What's the impact of the Snowden-effect on your newsroom?*

¹⁹⁶ Posetti J 2014b, 'One Year on: What's the impact of the Snowden-effect on your newsroom?' *World News Publishing Focus*, 20 June, accessed at: <http://blog.wan-ifra.org/2014/06/20/one-year-on-whats-the-impact-of-the-snowden-effect-on-your-newsroom> See also: <https://blog.wan-ifra.org/2014/06/16/unesco-call-to-editors-report-more-on-the-killing-of-journalists>.

- **June 2014:** *Trends in Newsrooms 2014* launched at World News Congress in Turin, Italy – featuring my essay about digital era source protection threats and newsroom responses

I was Editor of WAN-IFR/World Editors Forum’s flagship annual industry research report *Trends in Newsrooms 2014* (Posetti 2014d). The number one trend identified in 2014 was *The Urgent Need to Shield Journalism in the Age of Surveillance* (Posetti 2014c)¹⁹⁷

- **June 2014:** *I begin collaborating with UNESCO on the design of a research project to examine the threat to source confidentiality posed by mass surveillance and other Digital Age threats*¹⁹⁸

This research plan (designed by UNESCO’s Guy Berger and me) was ultimately commissioned as a report under the working title of *UNESCO Internet Study: Privacy Journalists’ Sources*. It later evolved into *Protecting Journalism Sources in the Digital Age* (Posetti 2017a)

- **July 2014:** *Summary of the Human Rights Council panel discussion on the safety of journalists: Report of the Office of the United Nations High Commissioner for Human Rights* (A/HRC/27/35)

The summary noted that the emergence of new forms of journalism (including social networks and blogs) has led to “greater vulnerability of the media, including illegal interference in the personal lives and activities of journalists. Such interference was to be condemned and the independence of the traditional and digital media supported”. (UN HRC 2014)

- **July 2014:** *‘The right to privacy in the digital age: Report of the Office of the United Nations High Commissioner for Human Rights’* (A/HRC/27/37)

The UN General Assembly mandated this report on protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale.

The Report found that in the digital era, communications technologies have enhanced the capacity of “Governments, enterprises and individuals to conduct surveillance, interception and data collection”.

¹⁹⁷ This report is appended to the exegesis as a secondary artefact.

¹⁹⁸ Private email correspondence with Dr Guy Berger.

It also acknowledged that:

Concerns have been amplified following revelations in 2013 and 2014 that suggested that, together, the National Security Agency (NSA) in the United States and General Communications Headquarters (GCHQ) in the United Kingdom of Great Britain and Northern Ireland have developed technologies allowing access to much global internet traffic, calling records, individuals' electronic address books and huge volumes of other digital communications content. (UN OHCHR 2014)

The Report quoted the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion, who said that technological advancements mean that States' effectiveness in undertaking surveillance is no longer limited by factors such as scale or the duration of an operation:

The State now has a greater capability to conduct simultaneous, invasive, targeted and broad-scale surveillance than ever before. In other words, the technological platforms upon which global political, economic and social life are increasingly reliant are not only vulnerable to mass surveillance, they may actually facilitate it.

The Report continued: **"The chilling effect on confidential sources, given the risk of profiling and exposure posed by the combination of data retention and the implications of big data analysis, is therefore further exacerbated."**

It also stated: "...the onus is on the Government to demonstrate that interference is both necessary and proportionate to the specific risk being addressed. Mass or 'bulk' surveillance programmes may thus be deemed to be arbitrary, even if they serve a legitimate aim and have been adopted on the basis of an accessible legal regime". In other words:

...it will not be enough that the measures are targeted to find certain needles in a haystack; the proper measure is the impact of the measures on the haystack, relative to the harm threatened; namely, whether the measure is necessary and proportionate.

Citing a European Court of Human Rights ruling, the report declared the onus should be on the State to ensure that any interference with the right to privacy, family, home or correspondence is authorised by laws that "...are sufficiently precise, specifying in detail the precise circumstances in which any such interference may be permitted, the procedures for authorising, the categories of persons who may be placed under surveillance, the limits on the duration of surveillance, and procedures for the use and storage of the data collected; and provide for effective safeguards against abuse". This prompts the question: Should journalists be excluded from mass surveillance? Is this feasible? And how would journalists/journalism be defined for the purpose of considering such exemptions? *Protecting Journalism Sources in the Digital Age* includes such a recommendation within the model framework for assessing source protection dispensations at the national level. (Posetti 2017a p37)

- **August 4th 2014: Contract signed between UNESCO and WAN-IFRA/World Editors Forum to produce a global report on 'Privacy and Journalists' Sources'¹⁹⁹**

This research project quickly evolved into *Protecting Journalism Sources in the Digital Age*²⁰⁰

- **September 2014: WAN-IFRA/World Editors Forum announce UNESCO source protection research collaboration**

I wrote a story about the research collaboration and assumed the dual role of Chief Researcher and study author: *World Editors Forum Commissioned to Conduct Study on Protection Of Journalists' Sources* (Posetti 2014a). WAN-IFRA also issued a press release available here: <http://www.wan-ifra.org/press-releases/2014/09/05/world-editors-forum-commissioned-by-unesco-to-conduct-study-on-the-protect> [Accessed 30/8/18]

- **September 2014: Resolution adopted by the UN Human Rights Council on the Safety of Journalists (A/HRC/27/L.7)²⁰¹**

The resolution acknowledged “the particular vulnerability of journalists to becoming targets of unlawful or arbitrary surveillance and/or interception of communications, in violation of their rights to privacy and to freedom of expression”. (UN HRC 2014b)²⁰² This observation has direct application to the issues of source protection and the safety of journalists and their sources.

- **October 2014: Protecting Sources - official UNESCO study survey launched**

We launched the main survey underpinning *Protecting Journalism Sources in the Digital Age* and commenced a social media campaign to engage participants. I also wrote a story about the launch for WAN-IFRA: *'Is it possible to protect journalists' sources in the digital age?', survey asks* (Posetti 2014e)

- **November 2014: UNESCO International Program for the Development of Communication (IPDC) Council decision**

In 2014, the IPDC's 39 Member-State council welcomed the UNESCO Director-General's Report on the Safety of Journalists and the Danger of Impunity, which states that it uses the term 'journalists' to designate the range of “journalists, media workers and social media producers who generate a

¹⁹⁹ Contract between UNESCO and WAN-IFRA signed by Dr Guy Berger & WAN-IFRA Secretary General Larry Kilman.

²⁰⁰ Posetti J (2014a) *World Editors Forum Commissioned to Conduct Study on Protection Of Journalists' Sources in the digital age*, 4 September, *World News Publishing Focus*. Accessed at: <http://blog.wan-ifra.org/2014/09/04/world-editors-forum-commissioned-by-unesco-to-conduct-study-on-the-protection-of-journali>

²⁰¹ UN Human Rights Council (2014) *Resolution adopted by the UN Human Rights Council on the Safety of Journalists* <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/166/14/PDF/G1416614.pdf?OpenElement>.

²⁰² See also Posetti, J (2018a) *Combating harassment: When journalists and their sources become targets* in Irecton, C & Posetti, J (Eds) *Journalism, 'Fake News' and Disinformation*. Paris: UNESCO (2018 Forthcoming).

significant amount of public-interest journalism”. (Posetti 2017a p38) The Council also reaffirmed the importance of condemnations of “the killings of journalists, media workers and social media producers who are engaged in journalistic activities and who are killed or targeted in their line of duty”. (Posetti 2017a p.38) This underlines my finding that a broad range of actors producing journalism in the public interest should be entitled to claim access to legal source protection frameworks where they exist.

- **December 2014: UN General Assembly Resolution on the safety of journalists and the issue of impunity** ([A/RES/69/185](#))

This UNGA resolution is relevant to source protection in the Digital Age, as it reiterates two observations pertinent to the implications of mass surveillance and questions of defining acts of journalism:

***Acknowledging** that journalism is continuously evolving to include inputs from media institutions, private individuals and a range of organisations that seek, receive and impart information and ideas of all kinds, online as well as offline, in the exercise of freedom of opinion and expression, in accordance with article 19 of the International Covenant on Civil and Political Rights, thereby contributing to the shaping of public debate* (Reaffirming the 2013 UNGA Resolution 163 above).

***Acknowledging** also the particular vulnerability of journalists to becoming targets of unlawful or arbitrary surveillance or interception of communications in violation of their rights to privacy and to freedom of expression* (Reaffirming the UN HRC resolution of 2014 above). (UN GA 2014)

- **March 2015: Council of Europe Committee on Legal Affairs and Human Rights, Report on Mass Surveillance**

This Report, prepared by Rapporteur Pieter Omtzigt, on the impact of mass surveillance on human rights, addressed the implications for journalistic source protection in the context of freedom of expression and access to information. He stated: When authors, journalists or civil society activists are reluctant to write, speak, or pursue research about certain subjects (e.g. the Middle East, criticisms of the government post-9/11, the Occupy movement, military affairs, etc.), or to communicate with sources or friends abroad for fear that they will endanger their counterparts by so doing, this does not only affect their freedom of speech, but also everyone else’s freedom of information (COE 2015 p.25). The Report also connected the detainment of Guardian journalist Glen Greenwald’s partner to the impact of surveillance. Greenwald was Snowden’s original confidante and court documents reveal that both Greenwald and his partner were under surveillance due to suspicion that they were transporting data associated with Snowden’s files. According to the Report, the Brazilian citizen had his mobile phone, laptop, DVDs and other items seized.

- **2015: CoE Resolution and Recommendation on mass surveillance**

The Council of Europe Committee on Legal Affairs and Human Rights unanimously adopted a Resolution, and a Recommendation, based on the Report discussed above, on April 21st 2015. The Resolution included the following statements:

The Parliamentary Assembly is deeply concerned about mass surveillance practices disclosed since June 2013 by journalists to whom a former US national security insider, Mr. Edward Snowden, had entrusted a large amount of top-secret data establishing the existence of mass surveillance and large-scale intrusion practices hitherto unknown to the general public and even to most political decision-makers. In the context of this concern, the Resolution makes the following additional points:

The surveillance practices disclosed so far endanger fundamental human rights, including the rights to privacy (Article 8 European Convention on Human Rights (ECHR), freedom of information and expression. These rights are cornerstones of democracy. Their infringement without adequate judicial control also jeopardizes the rule of law.

It is also worried by the collection of massive amounts of personal data by private businesses and the risk that these data may be accessed and used for unlawful purposes by state or non-state actors.

The Assembly is also deeply worried by the extensive use of secret laws, secret courts and secret interpretations of such laws, which are very poorly scrutinized. Relevantly, the associated Recommendation proposed by the Committee invited the CoE Council of Ministers to consider:

Addressing a recommendation to Member States on ensuring the protection of privacy in the digital age and internet safety in the light of the threats posed by the newly disclosed mass surveillance techniques

- **March 2015: UNESCO publishes Building Digital Safety for Journalism book**

This UNESCO study (produced as part of a series which includes *Protecting Journalism Sources in the Digital Age* was published) underlines the growing threats confronting digital journalists and provides a framework to help defend such journalism. In my [report for WAN-IFRA](#) (Posetti 2015g) about the study, I identified 12 key challenges recommendations within the book, which included this statement: “State and non-state actors can use location tracking technology to identify media actors – and their sources – who often need confidentiality for the production of journalism.”

- **May 2015: UNESCO World Press Freedom Day Riga Declaration references source protection and surveillance²⁰³**

This participants' declaration "Ensure that surveillance and data collection regimes show respect for the privacy of journalists and protect the confidentiality of sources". I was present at this event in Latvia and contributed to the framing of the declaration.

- **May 2015: Report on Encryption, Anonymity and the Human Rights Framework by UN Special on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye for UN Office of the High Commissioner for Human Rights (OHCHR) A/HRC/29/32 (Kaye 2015a)**

This report from the new Special Rapporteur emphasised the essential roles played by encryption and anonymity. According to Kaye, these defences – working separately or together - create a zone of privacy to protect opinion from outside scrutiny. With particular relevance to *Protecting Journalism Sources*, he highlighted the value of anonymity and encryption to journalists seeking to protect their confidential sources and their communications with them. "Journalists, researchers, lawyers and civil society rely on encryption and anonymity to shield themselves (and their sources, clients and partners) from surveillance and harassment," Kaye reported. A related issue addressed by Kaye was a trend involving States seeking to combat anonymity tools, such as Tor, proxies and VPNs, by denying access to them. Such moves can directly undermine attempts to protect confidential journalistic sources in the context of digital communications.

Kaye also acknowledged that many States recognise the lawfulness of maintaining the anonymity of journalists' sources. However, he reported that: "States often breach source anonymity in practice, even where it is provided for in law," highlighting the pressures on journalists that undermine these legal provisions – either directly, or progressively.

Another issue the Special Rapporteur also noted was the increasing prevalence and impact of compulsory SIM card registration on confidential communications, including those between journalists and their sources: "Such policies directly undermine anonymity, particularly for those who access the Internet only through mobile technology. Compulsory SIM card registration may provide Governments with the capacity to monitor individuals and journalists well beyond any legitimate government interest."

Kaye concluded that States should support and promote strong encryption and anonymity, and he specifically recommended strengthened legal and legislative provisions to enable secure journalistic

²⁰³ UNESCO (2015a) *Riga Declaration*
http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/WPFD/riga_declaration_en.pdf [Accessed 24/3/17]

communications. “Legislation and regulations protecting human rights defenders and journalists should also include provisions enabling access and providing support to use the technologies to secure their communications.”

- ***May 2015 - East African Court of Justice (EAJC) judgement on Burundi Press Law (Burundian journalists’ union v the Attorney General of the Republic of Burundi, Reference No.7 of 2013)***

In this judgement, the EAJC ruled Articles 19 & 20 of Burundi’s 2013 Press Law violated democratic principles and should be repealed. Article 20 of the 2013 Press law obligates journalists to “reveal their sources of information before the competent authorities in situations where the information relates to State security, public order, defence secrets and the moral and physical integrity of one or more persons”. However, the judges upheld the challenge originally brought by the Burundi Journalists Union, referring to the need for proportionality and necessity with regard to exceptions to source protection – even in cases of national security. They cited the Goodwin vs. UK judgment (2002, European Court of Human Rights) which states: “Protection of journalistic sources is one of the basic conditions for press freedom Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.” The judges in the Burundi case explained their position thus: ...because whereas the four issues named are important in any democratic state, the way of dealing with State secrets is by enacting other laws to deal with the issue and not by forcing journalists to disclose their confidential sources.... As for the issue of moral and physical integrity of any person, the obligation to disclose a source is unreasonable and privacy laws elsewhere can be used to deal with the matter. There are in any event other less restrictive ways of dealing with these issues. They concluded: “We have no hesitation in holding that Article 20 does not meet the expectations of democracy and is in violation of Articles 6(d) and 7(2) of the Treaty.”

- ***Trends in Newsrooms 2015 (featuring a chapter based on Protecting Journalism Sources in the Digital Age) launched in Turin, Italy (EVENT)***

This major industry report (appended in full to this exegesis) which I edited for WAN-IFRA, featured an essay based on my research for *Protecting Journalism Sources in the Digital Age* titled *Source Protection Erosion: The Rising Threat to Investigative Journalism*. I wrote a story based on the chapter for WAN-IFRA (in order to extend impact), available here: <https://blog.wan-ifra.org/2015/07/01/source-protection-erosion-a-global-case-study-on-the-rising-threat-to-investigative-journ>

- **June 2015: UNESCO publishes 11-point framework for Member States' assessment of legal and regulatory environments pertaining to source protection (an excerpt from the forthcoming *Protecting Journalism Sources in the Digital Age*)²⁰⁴**

This extract from *Protecting Journalism Sources in the Digital Age* was published as a preview of my forthcoming book, as part of the strategy of building a community of interest around the publication and developing public sphere debates.

I also wrote a story for WAN-IFRA about this launch, extending the concept of 'building content out of process'. It's available here: *New research: 11-point plan for protecting journalism sources in the digital age*: <https://blog.wan-ifra.org/2015/06/03/new-research-11-point-plan-for-protecting-journalism-sources-in-the-digital-age>

- **June 2015 Preliminary launch of *Protecting Journalism Sources in the Digital Age* findings, World News Congress, Washington D.C. (EVENT)**

I organised a panel discussion at WAN-IFRA's global conference to launch the preliminary findings from the research. I led the panel, which also featured Dr Guy Berger (UNESCO), Amy Mitchell (Pew Research Center) Gerard Ryle (ICIJ) and media lawyer Charles Tobin (the latter two had been expert interviewees for the study). We used this event as an action-research opportunity, feeding the comments from the experts into the final dataset for analysis. It also marked the beginning of a series of events to further 'make content out of process' and 'build communities of interest' around the study

- Guy Berger wrote a story for the UNESCO website, extending the reach: <http://www.unesco.org/new/en/communication-and-information/resources/news-and-in-focus-articles/all-news/news/unesco-research-is-previewed-at-editors-congress/>
- As a result of this 'noise-making' prominent Guardian columnist and academic Prof Roy Greenslade (Greenslade 2015) reported on the preview of the findings: 'How can journalists protect their confidential sources from exposure?' *The Guardian*, 4 June: <http://www.theguardian.com/media/greenslade/2015/jun/04/how-can-journalists-protect-their-confidential-sources-from-exposure>
- **June 2015: London launch of *Protecting Journalism Sources in the Digital Age* preliminary findings at the Frontline Club (EVENT)**

²⁰⁴ UNESCO (2015c) *Protecting Journalism Sources in the Digital Age* – promotional leaflet with 11-point plan https://blog.wan-ifra.org/sites/default/files/field_blog_entry_file/LEAFLET%20VERSION%202%20WEB.pdf [Accessed: 2/4/16].

As above, this event served the purpose of action-research and high-value community engagement. It was organised by the London Foreign Press Association in collaboration with WAN-IFRA and me. The Frontline Club showcases international journalists in regular talks at a venue where the profession's luminaries gather to dine and drink over their 'war stories'. I was joined on the panel by *The Times'* Investigations Editor Jonathan Calvert, the BBC's digital security guru Paul Myers, and prominent media QC Gavin Millar (whom I'd interviewed for the study), at an event anchored by the London Foreign Press Association's President, Paola Totaro. The Frontline Club wrote a story about the event:

<https://www.frontlineclub.com/under-surveillance-protecting-journalistic-sources/>

- **July 2015: I was invited as an expert to a consultation staged in Vienna by UN Special Rapporteur David Kaye**

This international experts' meeting served as a research roundtable for Prof Kaye's forthcoming Report on whistleblowers and journalists' sources presented to the UN in September this year.

- **July 27th, 2015: Final version of Protecting Journalism Sources in the Digital Age submitted to UNESCO for approval and publication**

Research undertaken for the study ceased on this date – the date the final manuscript was delivered to UNESCO²⁰⁵. However, another 22 months passed until the study was finally published in full.

- **July 2015: UNESCO study Keystones to foster inclusive knowledge societies published²⁰⁶**

This finalised UNESCO study, which was fed by my research for *Protecting Journalism Sources in the Digital Age*, proposed to UNESCO's 195 Member States that they: "Recognise the need for enhanced protection of the confidentiality of sources of journalism in the digital age". This statement was also contained in the Outcome Document of the "Connecting the Dots: Options for Future Action" conference convened by UNESCO in 3-4 March 2015. Responses to the survey attached to this study signalled the importance of UN positions on the issue of journalistic source protection and relevant responses were incorporated into the dataset for my UNESCO book.

- **September 2015: UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye submits report on protection of whistleblowers and sources to the UN General Assembly (Cites Protecting Journalism Sources in the Digital Age) A/70/361 (Kaye 2015b)**

This major report focused specifically on the need to protect journalists' sources and whistleblowers in

²⁰⁵ Private email correspondence with UNESCO

²⁰⁶ UNESCO (2015) *Keystones to foster inclusive knowledge societies: Access to information and knowledge, Freedom of Expression, Privacy, and Ethics on a Global Internet*
<http://unesdoc.unesco.org/images/0023/002325/232563E.pdf> [Accessed: 2/3/17]

the digital era (Kaye 2015b). It cites *Protecting Journalism Sources in the Digital Age* (which was still forthcoming at the time) on a number of occasions. For example, here:

*Everyone depends upon well-sourced stories in order to develop informed opinions about matters of public interest. Professional reporting organizations emphasize that named sources are preferable to anonymous ones. Nonetheless, reporters often rely upon, and thus promise confidentiality to, sources who risk retaliation or other harm if exposed. [Posetti 2015] Without protection, many voices would remain silent and the public uninformed.*²⁰⁷

As well as here:

...any person or entity involved in collecting or gathering information with the intent to publish or otherwise disseminate it publicly should be permitted to claim the right to protect a source's confidentiality. Regular, professional engagement may indicate protection, but its absence should not be a presumptive bar to those who collect information for public dissemination. [Posetti 2015]

And here:

*Protection must also counter a variety of contemporary threats. A leading one is surveillance. The ubiquitous use of digital electronics, alongside government capacity to access the data and footprints that all such devices leave behind, has presented serious challenges to confidentiality and anonymity of sources and whistle-blowers. [Posetti 2015]*²⁰⁸

- **September 2015: UNESCO publishes another extract from *Protecting Journalism Sources in the Digital Age* on gender dimensions of source protection**

I continued the pattern of writing stories about developments in the production process, building interest as the collaboration with UNESCO moved into the territory of collectively 'making content out of process'. See the WAN-IFRA story here: <https://blog.wan-ifra.org/2015/09/18/gender-dimensions-of-protecting-journalism-sources-in-the-digital-age>

²⁰⁷ Ibid p 7

²⁰⁸ Ibid p 11.

- **October 22, 2015: I presented the key findings and recommendations from *Protecting Journalism Sources in the Digital Age* on a panel with UN Special Rapporteur Prof David Kaye at UN HQ in New York^{209 210} (EVENT)**

This special side panel (organised by the Austrian delegation to the UN and civil society organisation Article 19) was staged at United Nations headquarters in New York during the 70th session of the UN General Assembly. UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, spoke on the panel, sharing details of his report (later presented to the UN GA) on digital threats to whistleblowers and sources. I spoke about my forthcoming UNESCO study. This event was sponsored by the Austrian permanent mission to the UN – which drew on the content to inform its co-sponsorship of the 2016 UN HRC Resolution on the Safety of Journalists (see details in timeline entry below).

- Vice reported on my study in response to this event:
<https://news.vice.com/article/whistleblowers-in-peril-as-government-policies-shaft-press-freedoms> (Oakford 2015)
- **November 2015: UNESCO publishes *World Trends in Freedom of Expression and Media Development 2015: Special Digital Focus*, featuring a major excerpt from *Protecting Journalism Sources in the Digital Age***

This second edition of the flagship UNESCO *World Trends* report featured a major extract from my UNESCO study, which summarised key global trends, findings and recommendations from the research. The chapter also presented the 11-point framework²¹¹ for assessing source protection dispensations in the digital age previewed during the World News Congress in Washington DC in June 2015. The framework embeds significant recommendations, as follows (Posetti 2015c):

1. Recognise the value to the public interest of source confidentiality protection, with its legal foundation in the right to freedom of expression (including press freedom), and to privacy. These protections should also be embedded within a country's constitution and/or national law,
2. Recognise that source protection should extend to all acts of journalism, and across all platforms, services and mediums (of data storage and publication), and that it includes digital data and meta-data,
3. Recognise that source protection does not entail registration or licensing of practitioners of

²⁰⁹ Austrian Permanent Mission to the UN (2015) Flyer promoting Article19/Austria side event during the 70th session of the UN General Assembly: <https://www.article19.org/data/files/medialibrary/38139/GA-Side-Event-with-David-Kaye-FINAL.pdf> [Accessed 2/7/18].

²¹⁰ Oakford, S (2015) *Whistleblowers in Peril as Governments Shaft Press Freedoms* Vice: <https://news.vice.com/article/whistleblowers-in-peril-as-government-policies-shaft-press-freedoms> [Accessed 20/7/17] Note: this is a report on the UN side panel I addressed on 22/10/16.

²¹¹ Ibid pp 88-89.

journalism,

4. Recognise the potential detrimental impact on public interest journalism, and on society, of source-related information being caught up in bulk data recording, tracking, storage and collection,
5. Affirm that State and corporate actors (including third party intermediaries) who capture journalistic digital data must treat it confidentially (acknowledging also the desirability of the storage and use of such data being consistent with the general right to privacy),
6. Shield acts of journalism from targeted surveillance, data retention and handover of material connected to confidential sources,
7. Define exceptions to all the above very narrowly, so as to preserve the principle of source protection as the effective norm and standard,
8. Define exceptions as needing to conform to a provision of “necessity” and “proportionality” — in other words, when no alternative to disclosure is possible, when there is greater public interest in disclosure than in protection, and when the terms and extent of disclosure still preserve confidentiality as much as possible,
9. Define a transparent and independent judicial process with appeal potential for authorised exceptions, and ensure that law-enforcement agents and judicial actors are educated about the principles involved,
10. Criminalise arbitrary, unauthorised and wilful violations of confidentiality of sources by third party actors,
11. Recognise that source protection laws can be strengthened by complementary whistleblower legislation.

Particularly noteworthy as evidence of shifting UN attitudes regarding digital journalism safety and source protection are publication of points 2, 4, 6, 9, and 10 above.

Once again, I wrote about the publication of the first major excerpt for WAN-IFRA (POSETTI 2015F): <https://blog.wan-ifra.org/2015/11/02/13-key-recommendations-and-findings-released-from-global-source-protection-study>

- ***December 2015: 38th UNESCO General Conference Resolution 38C/53²¹² endorses principles on protecting journalism sources in the Digital Age***

²¹² UNESCO (2015c) Text of UNESCO General Conference Resolution 38c/53 endorsed November 2015: <http://unesdoc.unesco.org/images/0023/002340/234090e.pdf> [Accessed 20/7/16].

The recommendations of the UNESCO study *Keystones to foster inclusive Knowledge Societies: Access to information and knowledge, Freedom of Expression, Privacy and Ethics on a Global Internet* (see timeline entry above) were endorsed at the 38th General Conference of UNESCO's Member States in November 2015²¹³. My research for Protecting Journalism Sources in the Digital Age was commissioned to feed this study and it was cited therein as a forthcoming UNESCO book. Two clauses of this Resolution pertinent to my work are:

4.4 Recognise the role that anonymity and encryption can play as enablers of privacy protection and freedom of expression and facilitate dialogue on these issues.

6.2 Recognize the need for enhanced protection of the confidentiality of sources of journalism in the digital age;

- **April 2016 International Journalism Festival panel, Italy (EVENT)**

Originally intended as a launch event, when the book's publication continued to be delayed, this panel instead engaged high-ranking international journalists (including Der Spiegel's Marcel Rosenbach, Heather Brooke, and Dan Gillmor) in a discussion about the preliminary findings. Once again, there was very significant interest in the book's urgent publication.

- Event video available here: <https://media.journalismfestival.com/programme/2016/protecting-journalism-sources-in-the-digital-age>

- **May 2, 2016: My World Press Freedom Day Op Ed in the Sydney Morning Herald carried across Fairfax Media metropolitan mastheads**

Posetti, J (2016) *Threats to Investigative Journalism Creep Close with Erosion of Source Protection in The Sydney Morning Herald*: <https://www.smh.com.au/opinion/threats-to-investigative-journalism-creep-closer-with-erosion-of-source-protection-20160502-gojvco.html> [Accessed: 17/7/18]

- **May 2016 UNESCO World Press Freedom Day panel – Helsinki (EVENT)**

I previewed the detailed findings and recommendations of Protecting Journalism Sources in the Digital Age at this major UNESCO conference in Helsinki, on a panel of journalists and human rights defenders, organized by Article 19.

²¹³ UNESCO (2015d) *UNESCO endorses new approach to internet issues* <https://en.unesco.org/news/unesco-endorses-new-approach-internet-issues> [Accessed 2/8/16].

- **May 3, 2016: UNESCO World Press Freedom Day Finlandia Declaration²¹⁴ referencing source protection in the Digital Age**

I previewed the detailed findings and recommendations of Protecting Journalism Sources in the Digital Age at this major UNESCO conference in Helsinki. The declaration endorsed by the conference included a call to UNESCO Member States to:

To ensure that legal frameworks are in place to protect the identity of confidential sources of journalism against direct and indirect exposure, and to protect whistleblowers.

- **September 2016: Resolution on Safety of Journalists adopted by UN Human Rights Council A/HRC/RES/33/2**

This is an important development in the UN's attention to source protection erosion, and digital era threats to journalism safety more broadly. But it is also significant in the context of situating *Protecting Journalism Sources in the Digital Age* on a timeline of UN developments in the space. Firstly, the resolution – adopted on September 29th, 2016 - acknowledges the 2015 UNESCO book *World Trends in Freedom of Expression and Media Development*²¹⁵ which published the core themes and findings of *Protecting Sources*:

Welcoming the important work of the United Nations Educational, Scientific and Cultural Organization for the safety of journalists, and taking note with appreciation of its 2015 publications entitled World Trends in Freedom of Expression and Media Development and Building Digital Safety for Journalism...

Pertinently, in paragraph 12 of the resolution, States are called upon to:

...protect in law and in practice the confidentiality of journalists' sources, in acknowledgement of the essential role of journalists in fostering government accountability and an inclusive and peaceful society, subject only to limited and clearly defined exceptions provided in national legal frameworks, including judicial authorization, in compliance with States' obligations under international human rights law;

And in paragraph 13, the resolution emphasises that:

²¹⁴ UNESCO (2016b) *Finlandia Declaration on Access to Information and Fundamental Freedoms*: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/WPFD/WPFD2016_Finlandia_declaration_3_may_2016.pdf [Accessed 2/5/17].

²¹⁵ Posetti, J (2015c).

...in the digital age, encryption and anonymity tools have become vital for many journalists to exercise freely their work and their enjoyment of human rights, in particular their rights to freedom of expression and to privacy, including to secure their communications and to protect the confidentiality of their sources, and calls upon States not to interfere with the use of such technologies, with any restrictions thereon complying with States' obligations under international human rights law.

- **November 2016: UN General Assembly Resolution on the Privacy in Digital Age**
A/C.3/71/L.39²¹⁶

This resolution is important to the evolution of UN responses to Digital Era source protection erosion and associated surveillance impacts in a range of ways.

Firstly, while noting the need for existing offline rights to privacy & freedom of expression captured by instruments like the Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights, it stresses:

...the importance of full respect for the freedom to seek, receive and impart information, including the fundamental importance of access to information and democratic participation,

Emphasises that:

...unlawful or arbitrary surveillance and/or interception of communications, as well as the unlawful or arbitrary collection of personal data, as highly intrusive acts, violate the right to privacy, can interfere with the right to freedom of expression and may contradict the tenets of a democratic society, including when undertaken on a mass scale.

It notes in particular that:

...surveillance of digital communications must be consistent with international human rights obligations and must be conducted on the basis of a legal framework, which must be publicly accessible, clear, precise, comprehensive and non-discriminatory and that any interference ...privacy must not be arbitrary or unlawful, bearing in mind what is reasonable to the pursuance of legitimate aims.

It also emphasises that States must respect international human rights obligations regarding the right to

²¹⁶ http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/71/L.39/Rev.1

privacy:

...when they intercept digital communications of individuals and/or collect personal data and when they require disclosure of personal data from third parties, including private companies

Further, it expresses 'deep concern':

...at the negative impact that surveillance and/or interception of communications, including extraterritorial surveillance and/or interception of communications, as well as the collection of personal data, in particular when carried out on a mass scale, may have on the exercise and enjoyment of human rights.

Additionally, it notes that:

...while concerns about public security may justify the gathering and protection of certain sensitive information, States must ensure full compliance with their obligations under international human rights law.

While reaffirming that:

...States must ensure that any measures taken to combat terrorism are in compliance with their obligations under international law, in particular international human rights, refugee and humanitarian law.

It also calls for the establishment and/or maintenance of:

...independent, effective, adequately resourced and impartial judicial, administrative and/or parliamentary domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data.

Along with:

...adequate legislation, with effective sanctions and remedies, that protects individuals against violations and abuses of the right to privacy, namely through the unlawful and arbitrary collection, processing, retention or use of personal data by individuals, governments, business enterprises and private organizations;

While calling on States to refrain from:

...requiring business enterprises to take steps that interfere with the right to privacy in an arbitrary or unlawful way.

All of the above issues and concerns were directly addressed in reference to investigative journalism impacts and source protection erosion in my UNESCO book chapter and the full study (a finalised draft version of which was already in the possession of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye who cited it in his report to the UN GA A/70/361 the previous year, as acknowledged in the text of this resolution).

- **November 2016: UNESCO publishes study on Privacy Free Expression and Transparency: Redefining their boundaries in the Digital Age²¹⁷**

This study references and overlaps with Protecting Journalism Sources in the Digital Age (which has been approved for publication but would not be published for another six months). It suggests that: “The protection of the confidentiality of sources of journalism in the digital age could be specifically provided for, including through revised legislation where appropriate”. The study also recommends recognition of the “need for enhanced protection of the confidentiality of sources of journalism in the digital age”.

- **November 2016 Invited expert for a major European Commission meeting in Brussels to speak about Protecting Journalism Sources in the Digital Age (which was still ‘forthcoming’) (EVENT)**

European Commission Colloquium on Media Pluralism and Democracy. See outcomes here:

http://ec.europa.eu/information_society/newsroom/image/document/2016-50/2016-fundamental-colloquium-conclusions_40602.pdf

- **December 2016: UNESCO publishes report on Human Rights and Encryption²¹⁸**

This study provides an overview of encryption as an increasingly essential element of the journalism and communications landscape, helping to guarantee confidentiality, access to information, privacy, authenticity, and anonymity. It explains that limitations on encryption need to be carefully scrutinized. It acknowledges that limitations on encryption potentially interfere with the right to freedom of expression. The study addresses the relevance of encryption to human rights in the media and

²¹⁷ Cannataci, J, Zhao B, Torres Vives, G, Monteleone, S, Mifsud Bonnici, J & Moyakine, E (2016) *Privacy Free Expression and Transparency: Redefining their boundaries in the Digital Age* Paris: UNESCO <http://unesdoc.unesco.org/images/0024/002466/246610E.pdf> [Accessed 20/7/18].

²¹⁸ Schulz, W. and J. v. Hoboken (2016) *Human rights and encryption* Paris: UNESCO <http://unesdoc.unesco.org/images/0024/002465/246527E.pdf> [Accessed 20/7/18].

communications field, along with the legality of interferences, and it offers recommendations for state practice and other stakeholders, calling for strong recognition at the international level.

- ***April 2017: International Journalism Festival panel discussion presenting defensive strategies for defending confidential journalistic communications (EVENT)***

Second attempt at launching the book at this major journalism event was postponed when publication was delayed again (although the book was finally launched two weeks later). Instead, I spoke about strategies to defend journalism against digital security threats, based on my research. *In harms way – newsrooms on the frontline* video available here:

<https://media.journalismfestival.com/programme/2017/in-harms-way-newsrooms-on-the-front-line>

- ***May 2017 UNESCO publishes Protecting Journalism Sources in the Digital Age***²¹⁹

The book was finally published on April 27th and officially launched by UNESCO during World Press Freedom Day (May 3rd) commemorations in Jakarta. The study examined the state of source protection in 121 countries and included findings from nearly 40 qualitative interviews and 135 survey respondents. In its launch statement, UNESCO described the book as a “**benchmark study three years in the making**” (UNESCO 2017a) which:

...identifies new developments that impacted on the confidentiality of journalists’ sources between 2007 and 2015 - such as digital surveillance, data retention practices, device seizures and national security and anti-terrorism laws. The result is that many existing laws to protect confidentiality are becoming outdated and risk becoming ineffective. Caution is expressed in the book that without revisions to reverse erosions of confidentiality, the future of investigative journalism could come under threat – leaving many stories of corruption and abuse hidden from public view. The study proposes an 11-point assessment tool for establishing the effectiveness of legal source protection frameworks.

According to Carter²²⁰ (2017) *Protecting Journalism Sources in the Digital Age* represents “a comprehensive research study and policy paper...that compiles references to the journalistic privilege and statements by U.N. actors that could support the privilege ...[and] a comprehensive eleven- part legal framework for development and review of national journalistic privilege”

Associated launch outputs produced by me:

²¹⁹ Posetti, J (2017a) Op. Cit.

²²⁰ Carter, E.L (2017) Op. Cit.

1. Posetti, J (2017b) *It's getting harder to report the truth in a post-Trump world*, in The Sydney Morning Herald: <https://www.smh.com.au/opinion/its-getting-harder-to-report-the-truth-in-a-posttrump-world-20170430-gvvlyw.html> [Accessed: 28/8/18]
2. The Conversation (By Julie Posetti): <http://theconversation.com/unesco-report-surveillance-and-data-collection-are-putting-journalists-and-sources-at-risk-77038>
3. WAN-IFRA/World Editors Forum A (By Julie Posetti): <https://blog.wan-ifra.org/2017/05/04/why-we-need-urgent-reforms-to-protect-sources>
4. WAN-IFRA/World Editors Forum B (By Julie Posetti): <https://blog.wan-ifra.org/2017/05/01/truth-in-the-age-of-trump-why-things-are-much-much-more-difficult>
5. Global Investigative Journalism Network (By Julie Posetti): <https://gijn.org/2017/05/29/the-eroding-state-of-source-protection/>
6. Mediashift: <http://mediashift.org/2017/05/will-take-protect-journalism-sources-digital-age/>

Selected Media coverage:

1. ABC Radio - Triple J "Hack" (Youth current affairs): <http://www.abc.net.au/triplej/programs/hack/whistleblower-press-freedom-are-under-threat-around-the-world/8491026>
2. Der Standard (in German): <http://derstandard.at/2000056860330/Investigativer-Journalismus-ist-wie-Kakerlaken-nichts-wird-ihn-umbringen>
3. Rappler (in Bahasa): <http://www.rappler.com/indonesia/berita/168607-ancaman-jurnalisme-investigasi-digital>
4. Rappler (in English): <https://www.rappler.com/trending/%20Julie%20Posetti>
5. ABC News/Current Affairs online: <http://www.abc.net.au/triplej/programs/hack/whistleblower-press-freedom-are-under-threat-around-the-world/8491026>
6. European Journalism Observatory (EJO) A (English): <http://en.ejo.ch/digital-news/protecting-journalism-sources-in-the-digital-age>
7. European Journalism Observatory (EJO) B (Italian): <http://it.ejo.ch/liberta-di-stampa/come-proteggere-le-fonti-nellera-digitale>
8. Ethical Journalism Network (EJN): <http://ethicaljournalismnetwork.org/reforms-protect-journalism-sources>
9. Mumbrella: <https://mumbrella.com.au/unesco-report-surveillance-data-collection-putting-journalists-sources-risk-442287>
10. BBC World Service, Newsroom (Live interview with Julie)
11. ABC Local Radio (Live interviews x 2 with Julie)

12. ABC Radio News (one of the lead stories nationally on Tuesday May 2nd in prime-time breakfast bulletins - including interview with Julie)
<http://www.abc.net.au/newsradio/content/s4662803.htm>
13. The Wire (India) <https://thewire.in/132391/surveillance-data-collection-putting-journalists-sources-risk/>
14. 24.hu (Hungarian news site) <http://24.hu/media/2017/05/03/veszelyben-a-tenyfeltaro-ujsgiras/>
15. GXPRESS <http://www.gxpress.net/posettis-study-shows-threat-to-investigative-journalism-cms-10994>
16. IJNET (ICFJ): <http://ijnet.org/en/blog/unesco-publishes-report-protecting-journalism-sources-world-press-freedom-day>

UNESCO launch activity:

1. UNESCO A: <http://en.unesco.org/news/unesco-releases-new-publication-protecting-journalism-sources-digital-age>
2. UNESCO B: <http://en.unesco.org/news/launch-new-unesco-study-confidentiality-journalism-sources>
3. Facebook LIVE interview with UNESCO:
<https://www.facebook.com/unesco/videos/10155294575148390/?pnref=story>

Media Releases:

1. University of Wollongong: <http://media.uow.edu.au/releases/UOW231748>
2. WAN-IFRA/World Editors Forum: <http://www.wan-ifra.org/press-releases/2017/05/01/new-study-surveillance-national-security-legislation-and-data-retention-la>

- ***May 1st, 2017 The Sydney Morning Herald publishes my Op Ed on source protection threats in a post-Trump world***

It's getting harder to report the truth in a post-Trump world, in The Sydney Morning Herald:

<https://www.smh.com.au/opinion/its-getting-harder-to-report-the-truth-in-a-posttrump-world-20170430-gvvlyw.html> (This report announced publication of the study and embedded the PDF of the book)

- **May 4th, 2017 UNESCO World Press Freedom Day declaration referencing source protection and defensive strategies to prevent interception²²¹**

This World Press Freedom Day declaration (carried the day after the launch of *Protecting Journalism Sources in the Digital Age*) referenced the importance of source protection and digital era threats posed to it in the following clauses:

18. Observing with concern the global trend to disproportionately limit freedom of expression in the name of national security and the fight against terrorism, as well as through disproportionate use of legislation and state security apparatus;

19. Emphasising the importance, for democratic civic and political life, of high-quality public-interest journalism, including investigative journalism, respecting professional and ethical standards and enjoying protection of confidentiality of sources, and recognising that such journalism represents a public good for all members of society;

20. Appreciating the importance of respect for the confidentiality of communications as a prerequisite for independent journalism, and the protection of journalists and their sources;

34. Recognise the legitimacy of the use of encryption and anonymisation technologies;

69. Highlight the importance of the protection of confidentiality of journalists' sources in the digital age

- **June 2017: Edward Snowden shares *Protecting Journalism Sources* on Twitter**

The man who blew the whistle on the NSA and initially operated as a confidential journalistic source to make world-changing revelations (revelations that eventually triggered the commissioning of *Protecting Journalism Sources in the Digital Age*) shared the study with his Twitter followers, sending my original tweet viral as a retweet.

²²¹ UNESCO (2017c) Jakarta Declaration, World Press Freedom Day:
https://en.unesco.org/sites/default/files/jakarta_declaration_4may2017_en.pdf [Accessed 20/7/2017].



- **June 2017: WAN-IFRA launch of *Protecting Journalism Sources in the Digital Age* at the World News Congress, Durban, South Africa (EVENT)**
- **June 2017: I spoke about the freshly published book on a high-level panel at the UN's World Summit on the Information Society (WSIS) in Geneva (EVENT)**

I sat on this UNESCO-convened panel with UN Special Rapporteur David Kaye and Assistant Director General Frank La Rue. I presented the major findings and recommendations from *Protecting Journalism Sources in the Digital Age* to a packed room of international diplomats and civil society representatives

- **August 2017: UN Secretary General's Report on Safety of Journalists and the Issue of Impunity (Cites *Protecting Journalism Sources in the Digital Age*) A/72/290²²²**

This Report from the UN Secretary General to the UN General Assembly references my study by name as an example of UNESCO work in the space that addresses gender themes (*Protecting Journalism Sources in the Digital Age* includes a section on 'Gender Dimensions Arising'²²³).

- **October 5th, 2017: European Court of Human Rights judgment (Becker vs. Norway, ECtHR. Application no. 21272/12) cites *Protecting Journalism Sources in the Digital Age***

²²² UN Secretary General (2017) *The safety of journalists and the issue of impunity: Report of the Secretary-General*: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/245/44/PDF/N1724544.pdf?OpenElement> [Accessed 20/11/17]

²²³ Posetti, J (2017a) Op. Cit. pp134-136

Source protection case brought by a Norwegian journalist Judge Tsotsoria's concurring opinion attached to the judgement reads in part:

*...we are living in the modern digital era where the legal framework of the protection of journalistic sources is under significant strain. This expands the risk of erosion, restriction and compromise in the work of journalists, with an impact on freedom of expression, the media and investigative journalism in particular [Reference: See generally, *Protecting Journalism Sources in the Digital Age*, UNESCO publication 2017]. The Court has been a frontrunner and an advocate of judicial protection of journalists and their sources and in so doing it has also served as an inspiration for many other jurisdictions. This path should not be reversed.²²⁴*
[https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-177349%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-177349%22]})

The judgement also cites UN Special Rapporteur Prof David Kaye's 2015 report to the UN General Assembly on protection of whistleblowers and sources that in turn references the pre-publication version of *Protecting Journalism Sources in the Digital Age*.

- **November 2017: Official Australian launch of *Protecting Journalism Sources in the Digital Age* (EVENT)**

Public Australian launch of *Protecting Journalism Sources* at the University of Wollongong's (UOW), inner-city campus overlooking Sydney harbour. Tickets for the event sold out and #ProtectSources (the hashtag associated with the book) trended in third place nationally on the night. The launch represented a collaboration between the Media Entertainment and Arts Alliance, The Walkley Foundation, UOW and me. Two prominent Australian investigative journalists (Paul Farrell and Elise Worthington) joined me on the panel, alongside a digital security expert (Peter Tonoli).

I wrote this story about source protection based on the study for the peak Australian investigative journalism body, The Walkley Foundation: <https://medium.com/the-walkley-magazine/protecting-sources-in-the-digital-age-3aa5959abeb>

- **November 2017: UNESCO General Conference Resolution on Strengthening UNESCO Leadership in the Implementation of the UN Plan of Action on Safety of Journalists and the Issue of Impunity**

²²⁴ European Court of Human Rights (5th Section). Judgement in the case of Becker vs. Norway (Application no. 21272/12). Issued 5 October 2007 in Strasbourg. Available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-177349%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-177349%22]}) [Accessed: 19/8/18]

During debate on this Resolution before the UNESCO Communication and Information Commission, convened within the General Conference, the Chair of the Commission Dr Martin Hadlow noted that:

*Many delegates informed the Commission of work undertaken in their countries related to the adoption of access to information laws, the safety of journalists, protection of journalists' sources, journalism education...*²²⁵

- **December 2017: UN General Assembly Resolution A/C.3/72/L.35 (recognises source protection and references my research)**²²⁶

Described as “significant” by civil society organisations²²⁷, this United Nations General Assembly Resolution integrates strong language from HRC resolution 33/2 on protecting digital security:

*...making clear that trust in technology and the confidentiality of communications is key to journalists and their confidential sources of information staying safe. Importantly, and in another first for the UNGA, it recognises anonymity and encryption tools as “vital” for journalists, and calls on states to not interfere with their use.*²²⁸

Specifically, the Resolution acknowledges:

...the particular risks with regard to the safety of journalists in the digital age, including the particular vulnerability of journalists to becoming targets of unlawful or arbitrary surveillance or interception of communications in violation of their rights to privacy and to freedom of expression.

And:

Calls upon States to ensure that measures to combat terrorism and preserve national security or public order are in compliance with their obligations under international law and do not arbitrarily or unduly hinder the work and safety of journalists. (13)

While emphasising that:

²²⁵ Hadlow, M (2017) *Oral Report by the Chairperson of the Communication and Information Commission to the Plenary* (39 C/INF.31) Note: this report is not publicly available in full, but it was sent to me by Dr Hadlow to inform my analysis of UNESCO processes. See next section about issues concerning UNESCO's historic role in commissioning freedom of expression research.

²²⁶ UN General Assembly (2017a) *Resolution on the safety of journalists and the issue of impunity* A/RES/72/175: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/72/175 [Accessed 17/7/18].

²²⁷ C.f. Article19 (2017) *UNGA Resolution Calls for an end to Attacks on Women Journalists* <https://www.article19.org/resources/unga-resolution-calls-end-attacks-women-journalists/> [Accessed 20/7/18].

²²⁸ Ibid.

...in the digital age, encryption and anonymity tools have become vital for many journalists to freely exercise their work and their enjoyment of human rights, in particular their rights to freedom of expression and to privacy, including to secure their communications and to protect the confidentiality of their sources, and calls upon States not to interfere with the use of such technologies and to ensure that any restrictions thereon comply with States' obligations under international human rights law (14)

However, as Article19 observed, the Resolution did not carry through language from an earlier draft replicating the very strong position of the Human Rights Council's 2016 Resolution on source protection in context of the safety of journalists (A/HRC/RES/33/2)

Unfortunately, the final resolution was not as comprehensive on the measures States must take in response to digital threats to journalists' safety as it could have been. Strong language calling for States to protect the confidentiality of journalists' sources in law was removed from the draft resolution in revisions leading up to adoption, due to opposition from a minority of States. That language, taken verbatim from HRC resolution 33/2, would have reflected in clear terms the international standard that judicial authorisation be required for States to take measures to reveal a journalist's confidential source, and UNGA endorsement of that principle would have been significant.

Nevertheless, the Resolution specifically 'recalls' the work in *World Trends in Freedom of Expression and Media Development 2015: Special Digital Focus* on the theme (which includes my chapter with strong recommendations for digital age source protection) and read in conjunction with the UN GA 2016 Resolution on Privacy in the Digital Age (A/C.3/71/L.39), it provides a significant boost to UN recognition of source protection as fundamental tenet of freedom of expression rights enshrined in international law (in the context of Digital Age threats) at the highest level.

- **March 2018: UNESCO Publishes *World Trends in Freedom of Expression and Media Development 2016-2018*²²⁹**

The third report in this flagship series references *Protecting Journalism Sources in the Digital Age* and identifies the ongoing threats posed via mass surveillance, targeted surveillance, and source protection erosion. It also identified 'global backsliding' in terms of respect for freedom of expression, media diversity, and journalistic safety and independence.

²²⁹ UNESCO (2018a) *World Trends in Freedom of Expression and Media Development: Global Report 2017/2018* <http://unesdoc.unesco.org/images/0026/002610/261065e.pdf> [Accessed 4/8/18] See pp56-58.

- **April 2018: Protecting Journalism Sources in the Digital Age showcased at the International Journalism Festival (EVENT: panels)**

Three x panels + roundtable (UNESCO story)

- **May 3rd 2018 (World Press Freedom Day): New project, Working With Whistleblowers in the Digital Age launched via European Journalism Observatory**

Posetti, J (2018a) *Working with whistleblowers in the Digital Age: new guidelines* at the European Journalism Observatory (EJO): <https://en.ejo.ch/specialist-journalism/working-with-whistleblowers-in-the-digital-age> [Accessed: 15/05/18]

- **May 2018: Accra Declaration²³⁰ - UNESCO World Press Freedom Day declaration recognising source protection threats and combative measures**

The declaration indicates mindfulness of:

...the particular difficulties of protecting, in the digital era, confidential journalistic sources, which is a pre-requisite for independent journalism; 21. Alarmed at the proliferation of laws restricting freedom of expression in the name of protecting national security and combating extremism and terrorism which fail to respect relevant international standards.

It calls on UNESCO Member States to:

35. Recognise in law the right of journalists to protect the secrecy of their confidential sources of information and ensure that such protection extends to cover digital surveillance and other ways in which sources might be exposed;

42. Refrain from conducting untargeted or indiscriminate surveillance, which is inherently disproportionate and is a violation of the rights to privacy and freedom of expression.

And it calls on UNESCO to:

60. Support training and capacity building to journalists in the area of digital safety and security, including the use of open and other technologies enabling such benefits as anonymity, encryption and material (content) security with a view, among other things, to preventing

²³⁰ UNESCO (2018b) *Accra Declaration: UNESCO World Press Freedom Day* https://en.unesco.org/sites/default/files/declaration_accra.2018-05-03.pdf [Accessed: 25/7/18].

digital surveillance of their work and digital attacks on their devices, and protecting their confidential sources of information.

Appendix 2: Protecting Journalism Sources in the Digital Age



United Nations
Educational, Scientific and
Cultural Organization

UNESCO
Publishing

Protecting Journalism Sources in the Digital Age

UNESCO Series on Internet Freedom

UNESCO Series on Internet Freedom

UNESCO has started in 2009 to commission this flagship series publications of Internet Freedom, aiming to explore the changing legal and policy issues of Internet and provide its Member States and other stakeholders with policy recommendations aiming to foster a conducive environment to freedom of expression on the net.

This is the 9th edition of the series, with previous editions presented as below:



Human rights and encryption

The study provides an overview of encryption technologies and their impact on human rights. It analyzes in-depth the role of encryption in the media and communications landscape, and the impact on different services, entities and end users. It highlights good practices and examines the legal environment surrounding encryption as well as various case studies of encryption policies. Built on this exploration and analysis, the research provides recommendations on encryption policy that are useful for various stakeholders



Privacy, free expression and transparency: redefining their new boundaries in the digital age

This study analyzes the interactions between the right to freedom of expression, the right to privacy and the value of transparency in the Internet environment. It covers the legal frameworks and current mechanisms for balancing rights, and presents specific issues, cases and trends. The interplays between multiple players – State actors, Internet users, ICT companies, civil society organizations, the judiciary, security services – are envisaged and recommendations for stakeholders are provided.



Principles for governing the Internet

As the sixth edition in the UNESCO Internet Freedom series, this study encompasses both quantitative and qualitative assessments of more than 50 declarations, guidelines, and frameworks. The issues contained in these documents are assessed in the context of UNESCO's interested areas such as access, freedom of expression, privacy, ethics, Priority Gender Equality, and Priority Africa, and sustainable development, etc.



Countering Online Hate Speech

The study provides a global overview of the dynamics characterizing hate speech online and some of the measures that have been adopted to counteract and mitigate it, highlighting good practices that have emerged at the local and global levels. The publication offers a comprehensive analysis of the international, regional and national normative frameworks, with a particular emphasis on social and non-regulatory mechanisms that can help to counter the production, dissemination and impact of hateful messages online.



Building digital safety for journalism: A survey of selected issues

As technologies develop, so do opportunities as well as threats to journalism. This research explains some of the emerging threats to journalism safety in the digital era, and proposes a framework to help build digital safety for journalists. Examining 12 key digital threats to journalism, ranging from hacking of journalistic communications, through to denial-of-service attacks on media websites, it assesses preventive, protective and pre-emptive measures to avoid them. It shows too that digital security for journalism encompasses, but also goes beyond, the technical dimension.

All publications can be downloaded at:

<http://www.unesco.org/new/en/communication-and-information/crosscutting-priorities/unesco-internet-study/>

Julie Posetti

Protecting Journalism Sources in the Digital Age

Published in 2017 by the United Nations Educational, Scientific and Cultural Organization,
7, place de Fontenoy, 75352 Paris 07 SP, France

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ISBN 978-92-3-100219-9



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Acknowledgments

The authors would like to thank the University of Wollongong (Australia) as well as UNESCO colleagues, in particular Caroline Hammarberg.

UNESCO thanks Sweden for its support in delivering this publication.



Administrative Support: Ashleigh Tullis

Graphic design: UNESCO

Cover design: UNESCO

Illustrations: UNESCO

Typeset and printed by UNESCO

Printed in France

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Foreword

UNESCO is pleased to release this comprehensive study of changes that impact on legal frameworks that support protection of journalistic sources in the digital age. This research responds in part to a UNESCO resolution by the 38th General Conference held in 2015 as well as the CONNECTing the Dots Outcome Document adopted by our 195 Member States that same year. More specifically, the present publication was elaborated in an effort to address option 6.2 of the Outcome Document which recommends that UNESCO “recognize[s] the need for enhanced protection of the confidentiality of sources of journalism in the digital age”.

In accordance with this mandate, UNESCO has developed a new approach to Internet and freedom of expression issues regarding safety, privacy, transparency, encryption, hate speech, radicalization and source protection. This is the framework of Internet Universality, and the Internet governance principles of Human Rights, Openness, Accessibility, and Multi-stakeholder Participation. The protection of confidentiality of journalists’ sources relates especially to the right to freedom of expression (and the correlatives of press freedom and access to information), and the right to privacy.

While the rapidly emerging digital environment offers great opportunities for journalists to investigate and report information in the public interest, it also poses particular challenges regarding the privacy and safety of journalistic sources. These challenges include: mass surveillance as well as targeted surveillance, data retention, expanded and broad anti-terrorism measures, and national security laws and over-reach in the application of these. All these can undermine the confidentiality protection of those who collaborate with journalists, and who are essential for revealing sensitive information in the public interest but who could expose themselves to serious risks and pressures. The effect is also to chill whistleblowing and thereby undermine public access to information and the democratic role of the media. In turn this jeopardizes the sustainability of quality journalism.

The present research provides a comprehensive review of developments that can impact on the legal frameworks that support protection of journalistic sources. Interviews, panel discussions, thematic studies and a review panel ensured the input of legal and media experts, journalists and scholars. This in-depth study thus seeks to assess the evolution of protective legal frameworks over the eight years from 2007-2015, and provides recommendations for the future of journalistic source protection.

The study found that the legal frameworks that protect the confidential sources of journalism are under significant strain in the digital age. This context is leading journalists to adapt their work methods in an effort to shield their sources from exposure. A majority of the States examined have protections for journalistic sources which now merit revision and strengthening.

A further finding is that all stakeholders have a crucial role to play in the introduction, development or updating of better legal safeguards for all acts of journalism, including for whistleblowers. The research also provides recommendations on journalistic source protection, starting with independent oversight on surveillance and data retention, through to the development of education and training programs in digital safety.

A major output of the study is an 11-point assessment tool for measuring the effectiveness of legal source protection frameworks in the digital era. In this way, the research serves as guidance for UNESCO, Member States and other stakeholders to promote and implement more protective frameworks for the confidentiality of journalistic sources. We further hope that this publication will prove valuable in framing the debate on the new forms of journalism and in encouraging public understanding of these issues.

This research is published as part of a publications series on Internet Freedom that was begun in 2009 and that has strived to develop an Internet Universality framework.

The work for the study was conducted for UNESCO by WAN-IFRA, the global news publishing association that houses the World Editors Forum (WEF). UNESCO would like to thank WAN-IFRA and the author, Julie Posetti, affiliated with the University of Wollongong (Australia), as well as the other academic researchers, research assistants, experts, journalists, lawyers and other interviewees who have contributed to the production of the text.

Frank La Rue

Assistant Director-General
for Communication
and Information

Executive summary

This Study, which covers 121 UNESCO Member States, represents a global benchmarking of journalistic source protection in the Digital Age. It focuses on developments during the period 2007-2015.

The legal frameworks that support protection of journalistic sources, at international, regional and country levels, are under significant strain in 2015. They are increasingly at risk of erosion, restriction and compromise - a development that is seen to represent a direct challenge to the established universal human rights of freedom of expression and privacy, and one that especially may constitute a threat to the sustainability of investigative journalism.

In many of the countries examined in this Study, it was found that legal source protection frameworks are being actually or potentially:

- Overridden by national security and anti-terrorism legislation
- Undercut by surveillance – both mass and targeted
- Jeopardised by mandatory data retention policies and pressure applied to third party intermediaries - like ISPs, telcos, search engines, social media platforms - to release data which risks exposing sources
- Outdated when it comes to regulating the collection and use of digital data, such as whether information recorded without consent is admissible in a court case against either a journalist or a source; and whether digitally stored material gathered by journalistic actors is covered by existing source protection laws.
- Challenged by questions about entitlement to claim protection - as underscored by the questions: "Who is a journalist?" and "What is journalism?"

Several of these categories intersect and overlap, especially in the cases of national security, surveillance and data retention.

These findings are based on an examination of the legal source protection frameworks in each country, drawing on academic research, online repositories, reportage by news and human rights organisations, more than 130 survey respondents and qualitative interviews with nearly 50 international experts and practitioners globally. The study was commissioned as part of the research for an overarching global UNESCO Internet Study, mandated in 2013 by UNESCO's General Conference of 195 Member States in Resolution 52. This mandate called for a comprehensive and consultative study of four dimensions of the Internet as relevant to the remit of UNESCO. Covering access to information and knowledge, freedom of expression, privacy and the ethical dimensions of the information society, this wider study was published as *Keystones to foster inclusive Knowledge Societies* (UNESCO 2015). Resolution 52 also specifically noted "that privacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law, and that such privacy should not be subject to arbitrary or unlawful interference" (UNESCO 2013).

This study covers the period 2007-2015, and builds on a 2007 study produced by Privacy International (Banisar 2007).

Of the 121 Member States studied here, developments that impact on source protection in practice, or in potential, have occurred in 84 (69%) countries since 2007, the date of the Privacy International review of source protection laws. However, these changes were not evenly dispersed around the world. The UNESCO region reflecting the most notable developments was the Arab States, where 86% of countries examined demonstrated shifts. Latin America and the Caribbean followed closely behind, with developments in legal protections for journalists' sources recorded in 85% of the States studied. In Asia and the Pacific, 75% of States exhibited notable changes, while 66% of European and North American States also demonstrated developments since 2007. Finally, changes were identified in 56% of African countries examined.

Significant changes in the offline realm of source protection are more prominent in Africa and the Arab States, but they are not limited to these regions. Digital developments were found to be most prevalent in Latin America, Asia, Europe and North America.

While traditional legal frameworks for source protection remain strong in some states, and are progressing in others, they are under significant risk from a combination of developments. These are caused, for the most part, by digital disruption, and by overreach in measures that are introduced in the name of national security or combatting crime. The Study assesses that unless journalistic communications are recognised, surveillance is made subject to checks and balances (both mass and targeted); data retention laws are limited; accountability and transparency measures (applied to both States and corporations) are improved, confidence in the confidentiality of sources could be seen to be weakened. The result could be that much public interest information, such as that about corruption and abuse, will remain hidden from public view.

Many journalists are now significantly adapting their work in an effort to shield their sources from exposure, sometimes even seeking to avoid electronic devices and communications altogether. At the same time, the cost of the digital era source protection threat is very significant - in terms of digital security tools, training, reversion to more labour intensive analogue practices, and legal advice. Regardless, such tactics may be insufficient if legal protections are weak, anonymity is forbidden, encryption is disallowed, and sources themselves are unaware of the risks. The impact of these combined factors on the production and scope of investigative journalism based on confidential sources is significant.

Where source protection is compromised, the impacts can include:

- Pre-publication exposure of journalistic investigations which may trigger cover-ups, intimidation, or destruction of information,
- Revelation of sources' identities with legal or extra-legal repercussions on them,
- Sources of information running dry,
- Self-censorship by journalists and citizens more broadly.

If confidential sources are to confidently make contact with journalists, this Study proposes five conditions for consideration:

- Systems are put in place for transparency and accountability regarding data retention policies and surveillance (including both mass surveillance and targeted surveillance) – as recommended by the UN General Assembly,
- Steps are taken by States to adopt, update and strengthen source protection laws and their implementation for the digital era,
- Training is provided to journalistic actors in regard to digital safety and security tactics,
- Efforts are made to educate the public and sources in Media and Information Literacy, including secure digital communications,
- There is recognition of the application of source protection laws to acts of journalism that encompass digital reporting processes (e.g. phone calls, emails, messaging apps, and hand written notes), along with published content – both digital and non-digital.

A major recommendation of this study is consideration of an 11-point assessment tool for measuring the effectiveness of legal source protection frameworks in the digital age. The 11 points were developed through consultation with 31 international experts in media law, freedom of expression, ICTs, and investigative journalism practice.

On the basis of this output, a model legal source protection framework should:

1. Recognise the value to the public interest of source confidentiality protection, with its legal foundation in the right to freedom of expression (including press freedom), and to privacy. These protections should also be embedded within a country's constitution and/or national law,
2. Recognise that source protection should extend to all acts of journalism, and across all platforms, services and mediums (of data storage and publication), and that it includes digital data and meta-data,
3. Recognise that source protection does not entail registration or licensing of practitioners of journalism,
4. Recognise the potential detrimental impact on public interest journalism, and on society, of source-related information being caught up in bulk data recording, tracking, storage and collection,
5. Affirm that State and corporate actors (including third party intermediaries) who capture journalistic digital data must treat it confidentially (acknowledging also the desirability of the storage and use of such data being consistent with the general right to privacy),
6. Shield acts of journalism from targeted surveillance, data retention and handover of material connected to confidential sources,
7. Define exceptions to all the above very narrowly, so as to preserve the principle of source protection as the effective norm and standard,
8. Define exceptions as needing to conform to a provision of “necessity” and “proportionality” — in other words, when no alternative to disclosure is possible, when there is greater public interest in disclosure than in protection, and when the terms and extent of disclosure still preserve confidentiality as much as possible,

9. Define a transparent and independent judicial process with appeal potential for authorised exceptions, and ensure that law-enforcement agents and judicial actors are educated about the principles involved,
10. Criminalise arbitrary, unauthorised and willful violations of confidentiality of sources by third party actors,
11. Recognise that source protection laws can be strengthened by complementary whistleblower legislation.

This Study concludes that law-makers, journalists, editors and publishers among others can play an important role in promoting public understanding of these issues, and in advocating for change.

A summary leaflet of this publication is available at: http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/protecting_journalism_sources_in_digital_age.pdf

*A summary is also available as a chapter in UNESCO's report *World Trends in Freedom of Expression and Media Development, Special Digital Focus*, 2015. <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/wtr-special-digital-focus-2015/>*

1. Introduction

"...Privacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law, and...such privacy should not be subject to arbitrary or unlawful interference..." (UNESCO Resolution on Internet-related issues, November 2013).

Internationally, source protection laws are increasingly at risk of erosion, restriction and compromise in the digital era, a development that can be seen to challenge the rights to freedom of expression and privacy (Article 12; Article 19 UDHR, Article 19 ICCPR 1976).

Journalists rely on source protection to gather and reveal information in the public interest from confidential sources. Such sources may require anonymity to protect them from physical, economic or professional reprisals in response to their revelations. There is a strong tradition of legal source protection internationally, in recognition of the vital function that confidential sources play in facilitating 'watchdog' or 'accountability' journalism. While professional journalistic practice entails multi-sourcing, verification and corroboration, confidential sources are a key component of this practice. Without confidential sources, many acts of investigative story-telling - from Watergate to the major 2014 investigative journalism project 'Offshore Leaks' undertaken by the International Consortium of Investigative Journalists (ICIJ) (Guevara et al, 2014) - may never have surfaced. Even reporting that involves gathering opinions in the streets, or a background briefing often relies on trust that a journalist respects confidentiality where this is requested.

There is a globally established ethical obligation upon journalists to avoid revealing the identity of their confidential sources. In some cases, it is also a legal right, or even a legal requirement. In Sweden, protection of confidential sources is so strong that journalists can be prosecuted for revealing their identities (Hendler 2010). However, in many cases, the legal situation does not grant recognition of such confidentiality and journalists can still be legally compelled to identify their sources or face penalties, prosecution and imprisonment. Exceptions to legal protection might include circumstances involving grave threats to human life, when a journalist is accused of committing a crime, or if s/he witnesses a serious crime. Where the legal line is drawn, and how it is interpreted, varies around the world but the principle that sets confidentiality as the norm, and disclosure as the exception, is the generally accepted standard.

The value to society of protecting the confidentiality of sources is widely recognised as greatly offsetting occasional instances of journalists abusing the confidentiality privilege to, for example, invent sources. Such scandals invariably come to light, and they are strongly condemned by journalists' professional organisations that stress the requirement to only rely on anonymous sources when it is necessary to do so to protect the source from exposure, in the course of public interest journalism. Accordingly, free expression standards internationally uphold the confidentiality principle. This principle shields the journalist directly by recognising their professional obligation not to disclose the identity of the source, and it shields the source indirectly through the journalist's commitment. However, this principle works in practice only if the identity of the confidential source cannot be easily discovered by other means, and if there are limits on the use of identifying information if it does become known.

Journalists do not encourage or condone law-breaking, or unsanctioned leaking, but they do have a duty to consider the public interest significance of publishing the resulting

information, and in maintaining confidentiality accordingly, in order not to jeopardize the flow of such information which is vital to accountability journalism.

The need to protect the confidentiality of sources is justified largely in terms of ensuring a free flow of information, especially in regard to information derived from whistleblowers.¹ Without this, a 'chilling effect' is likely, with holders of sensitive information being reluctant to come forward. As another knock-on effect, when media outlets or individuals doing journalism know or suspect that they will be put under pressure to reveal sources, they may become less likely to seek or subsequently use information supplied on condition of confidentiality, with concomitant shrinkage of public interest content as a result.

The implications of the digital era

The current digital environment poses particular challenges to traditional legal protections for journalists' sources. While protective laws and/or a reporter's commitment shielded the identity of sources in the analogue past, in the age of digital reporting, mass surveillance, mandatory data retention, and disclosure by third party intermediaries, this traditional shield can be penetrated.

Technological developments and a change in operational methods of police and intelligence services are redefining the legal classification of privacy and journalistic privilege internationally (Podkowik 2014). In addition, aided by rapid technological advancement, law enforcement and national security agencies have shifted from a process of detecting crimes already committed, to one of threat prevention in the post-September 11 environment. In the digital age, it is not the act of committing (or suspicion of committing) a crime that may result in a person being subject to surveillance, but the simple act of using certain modes of communication – such as mobile technology, email, social networks and the Internet (Podkowik 2014; Banisar 2008). As a result, journalistic communications are increasingly being caught up in the nets of law enforcement and national security agencies as they trawl for evidence of criminal activity, terrorism and national security threats, and conduct leak investigations.

Parallel to these digital developments, over the past eight years increasingly restrictive anti-terrorism and national security legislation has been enacted, actually or potentially overriding existing legal protections, including 'shield laws' (see definitions and discussions of these key terms in section 4.1 below). This arises from moves to broaden the scope of 'classified' information and exceptions to coverage, and to criminalise all disclosure of 'secret' information (including in some cases, the publication thereof) irrespective of public interest or whistle-blowing considerations. The result of the increasing risk to both journalists and their sources is a further constraining, or "chilling", of public interest journalism dependent upon confidential sources.

In this digital and security-driven context, it becomes important to extend legal source confidentiality protection to all acts of journalism, not just to issues of identification after the publication of content based on confidential communications, but also to related prior

1 Martin (1983) describes whistleblowing as disclosure by an employee of his (sic) employer's improper activities and whistleblowers as "...merely ordinary employees who feel so troubled by their employer's conduct that they feel compelled to take action" (Martin, M "Protecting the Whistleblower from Retaliatory Discharge", 16 U. Mich. J.L. Reform 727 (1983) p1. Available at: http://scholarship.kentlaw.iit.edu/fac_schol/372). Whistleblowing may, however, be wider than this, covering public interest issues more broadly than employers' conduct.

digital reporting processes and journalistic communications with sources. Additionally, it is important to debate which journalistic actors qualify for source protection in the digital era – and where there is a need to answer questions like ‘Who can claim entitlement to source confidentiality protection laws?’

There are also new questions now facing courts, legislators, media lawyers and journalists. In the analogue era, these were: 1) Can a journalist be forced to reveal the confidential source of published information by a court? 2) Can journalists and news organisations be the subject of targeted surveillance and search and seizure operations? Now, the key questions are increasingly: 1) Do the processes of automatically intercepting and collecting communications through mass surveillance and mandatory data retention which enable subsequent analysis via technologically advanced tools (e.g. Programs that give intelligence agencies access to third party intermediary data stores) constitute a breach of recognition of a right to withhold the identity of sources? 2) Can the effects of such potential interference be minimised or limited through introducing or updating legal source protection frameworks that engage with these challenges? It is the new implications of the digital age that are the main focus of exploration in this study

1.1. Background to the Study

As elaborated later in these pages, the issue of confidentiality of journalists’ sources has become a subject of attention within the United Nations. In particular, in November 2013, a UNESCO Resolution mandated the Organisation to undertake a comprehensive study on Internet-related issues. It declared that: “Privacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law, and that such privacy should not be subject to arbitrary or unlawful interference” (UNESCO 2013). The research contained in this publication fed into the comprehensive study, and is published here in elaborated detail.

1.2. Issues and purpose of the research

The purpose of this Study is to provide quantitative data and qualitative analysis around the world linked to protection of journalists’ sources in the digital age (UNESCO: 2014 a). As indicated earlier, its findings have informed the overarching global UNESCO Internet Study (UNESCO: 2014 b; UNESCO: 2015).

The research was conducted by WAN-IFRA, the global news publishing association that houses the World Editors Forum (WEF). The author, Julie Posetti, led the project as WAN-IFRA Research Fellow and WEF Research Editor, with the support of the University of Wollongong, Australia.

2. Methodology

2.1. Research methods deployed

A combination of quantitative and qualitative methodologies was adopted for this study.

i. Structuring the research

An eight-year-old report commissioned by Privacy International called *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources* (Banisar 2007) was intended to be used as the baseline data set for this study, which was commissioned in mid-2014. However, this approach proved complex, as the 2007 report did not provide a complete public data set.

As a result, the researchers applied a process of 'datafication' to the 2007 report. This process involved hand-mining and keyword searching the document to a) identify every country mentioned in the report and b) establish which countries required additional research to strengthen the available data, thereby enabling an updated benchmarking of the 2007 research. The result was the development of an Excel database that listed each country identified in the 2007 report, along with the different kinds of legal protections applicable globally (e.g. constitutional protections, state-based laws, memoranda of understanding).

There were 124 territories identified through the 'datafication' of the Privacy International report (see section 14.1, Appendix i). The limitation of the research to UNESCO Member States reduced the number of countries selected for examination in this Study to 121. It is this sub-set of countries (see section 14.2, Appendix ii), which constitutes the focus for the research presented here.

ii. Environmental Scan

Once the initial data set was established, each country was assigned to a researcher or research assistant, according to language capacity, for commencement of a qualitative mapping exercise, known as an Environmental Scan. In total, there were five academic researchers commissioned to work on this project, along with 11 research assistants. The languages spoken by the researchers also totalled 11: English, Chinese, Portuguese, Spanish, French, Italian, Russian, Arabic, Vietnamese, Tagalog and German. Where countries were assigned to researchers without relevant language skills, the research was conducted targeting English language sources and replicating the search in a second language where possible. The process of undertaking the Environmental Scan involved:

- a. Preparing a literature review (focused on scholarly books, journals and major reports)
- b. Online searches of legal, legislative, and relevant NGO databases in each country
- c. Online searches of news websites
- d. Contacting WAN-IFRA member organisations and affiliates for input
- e. Contacting sources in countries

Data collection began on August 1st 2014 and ended on July 20th 2015, when the study was submitted to UNESCO.

Issues arising

There are two important observations to make about the efficacy of the Environmental Scan process when applied globally:

- a. In some countries there are issues with availability of information, resulting in limitations in terms of what data could be collected
- b. In some contexts there is limited information that is published online, which further constrained the research in all 121 countries.

iii. Preliminary Analysis of country data

Once each country was examined via the Environmental Scan process, the assigned researcher or research assistant produced a 'country overview', identifying any developments relevant to confidential source protection that had occurred in the legal/regulatory/judicial/journalistic environment of that country regarding source protection since 2007, and noting specific digital dimensions. This allowed the author and research assistants to then code the documents produced to further narrow the data corpus to a narrower subset of countries where developments had been identified since 2007.

Ultimately, developments pertaining to legal protections for journalists' sources were recorded in 84 out of the 121 countries (69%) studied. These countries were then divided into UNESCO regional groups, as follows:

- i. Africa
- ii. Arab States
- iii. Asia and the Pacific
- iv. Europe and North America
- v. Latin America and the Caribbean

iv. Surveys

A set of online survey questions (see 14.4, Appendix iv) was developed by the author, in consultation with academic members of a Review Panel that was set up to assist this Study (see below, Posetti 2014a). These questions were qualitative in nature and designed to engage members of the journalistic, academic, legal, freedom of expression and online communities globally. Specifically, they were asked to: pinpoint shifts in the legal and regulatory environment pertaining to source protection since 2007; identify key experts/actors for future qualitative interviews; and suggest potential case studies. This survey was launched in October 2014 and it continued until January 2015.

The relevant results of an earlier online survey, developed by the author, and launched during the World Editors Forum (WEF) in Turin (Italy) in June 2014, were synthesised with the data from the survey (as described above) distributed in connection with this UNESCO-commissioned Study. The earlier WEF survey targeted editors and investigative journalists,

and it was designed to feed a submission to the over-arching UNESCO Internet Study. It asked for evidence of the impact of the 'Snowden-Effect' on newsrooms globally, in terms of changes in training and practice in reference to source protection, along with broader digital safety issues (Posetti 2014b). The results of the WEF survey usefully expanded the corpus of data examined in this Study as regards the impacts on investigative journalism, and editorial processes and practices, related to challenges posed to legal source protection frameworks in the digital era.

Further, relevant survey data from the over-arching UNESCO Internet Study Survey was provided to the author for examination. Question number 9 of that survey asked: "To what extent do laws protect digitally interfaced journalism and journalistic sources?" (UNESCO 2014b). The author analysed these responses and synthesised the data with that flowing from the two surveys referenced earlier, to produce a complete data set.

In addition to the issues identified in reference to the Environmental Scan process, it is acknowledged that the online nature of the surveys may have discouraged some participants, particularly in light of the subject matter. It is possible that some potential participants may have been concerned about the monitoring and interception of their online communications and therefore elected not to take part in the survey.

Nevertheless, 134 people from 35 countries - representing every UNESCO region - responded to the combined surveys. The survey data was scanned for evidence of changes to legal source protection frameworks, and digital dimensions, which had not been captured in the Environmental Scan process. Such relevant data was used to augment the regional overviews presented below, assist in the identification of expert actors, and in the development of the thematic studies.

v. Qualitative interviews

Dozens of key actors with legal, journalism, and freedom of expression expertise were identified through the Environmental Scan and survey processes. Ultimately, 49 interviewees were selected from 22 countries (see 14.5, Appendix v) on the basis of relevant expertise, and with the goal of achieving regional and gender balance. The author developed nine key qualitative questions to be put to each expert actor for consistency (See 14.6, Appendix vi). Long form, semi-structured qualitative interviews were then conducted by the researchers and research assistants (as assigned in accordance with language capacity), with the selected interviewees. These interviews were conducted via telephone, Skype, email and face-to-face between November 2014 and March 2015. They were recorded, transcribed and coded before being analysed by the author. These interviews served the purpose of deepening the research and forming the foundation of the thematic studies.

vi. Panel Discussions

The author convened two panel discussions on this research during its final phase. The first panel, staged in Washington DC during the World Editors Forum in June 2015 (Greenslade 2015; Posetti 2015d), featured the author and the following experts:

1. Gerard Ryle (Executive Director, International Consortium of Investigative Journalists)
2. Charles Tobin (US attorney specialising in source protection)

3. Amy Mitchell (Director of Journalism Research, Pew Research Centre)
4. Guy Berger (Director of Freedom of Expression and Media Development, UNESCO)

The second panel convened to discuss this Study was hosted jointly by the London Foreign Press Association and the Frontline Club in London, in July 2015 (Churchill 2015). The panellists were:

1. Jonathan Calvert (Editor, Insight, The Sunday Times)
2. Gavin Millar QC (Barrister specialising in media law, including source protection)
3. Jeremy Myers (BBC Internet Research Specialist)
4. Julie Posetti (Author of this study *Protecting Journalism Sources in the Digital Age*; WAN-IFRA; University of Wollongong)

The contributions of the panellists during both sessions were leveraged to update and strengthen this Study's analysis during the final phase of research. Subsequent presentations of the draft research during 2015 at the Stockholm Internet Forum and the Internet Governance Forum elicited comments from a further range of participants from other parts of the world, and this feedback has enriched the published version of this study.

vii. Thematic Studies

Many potential case studies were identified in the Environmental Scan and survey processes. Ultimately, three thematic studies were selected for in-depth analysis to ensure representation of key issues and reflection of regional and linguistic diversity. The thematic studies draw on the detail of 134 international survey respondents and 49 qualitative interviews (as explained in detail earlier).

The thematic studies featured in this Study are:

- a. *The impact of source protection erosion in the digital era on the practice of investigative journalism globally.*
- b. *Sweden: How a State with one of the oldest and strongest legal source protection frameworks is responding and adapting to emerging digital transformation and associated threats.*
- c. *Model assessment tool for international legal source protection frameworks.*

viii. Review Panel

A Review Panel comprising eight experts in journalism, freedom of expression, ICTs and media law from around the globe was established by the author, in consultation with UNESCO, for the purposes of providing expert advice and feedback on research outputs. Their feedback was incorporated into the Study (See 14.5, Appendix v).

3. Key findings

1. The issue of source protection has come to intersect with the issues of mass surveillance, targeted surveillance, data retention, the spill-over effects of anti-terrorism/national security legislation, and the role of third party Internet companies known as “intermediaries”
2. Legal and regulatory protections for journalists’ sources are increasingly at risk of erosion, restriction and compromise
3. 84 UNESCO Member States out of 121 studied (69%) for this report demonstrated developments relevant to the protection of confidentiality of journalistic sources, mainly with actual or potential impact, between 2007 and mid-2015
4. Individual states face a need to introduce or update source protection laws
5. Source protection laws need to cover journalistic processes and communications with confidential sources – including telephone calls, social media, messaging apps, and emails – along with published journalism that depends on confidential sources
6. Transparency and accountability regarding both mass and targeted surveillance, and data retention, are critically important if confidential sources are to be able to continue to confidently make contact with journalists
7. Without substantial strengthening of legal protections and limitations on surveillance and data retention, investigative journalism that relies on confidential sources will be difficult to sustain in the digital era, and reporting in many other cases will encounter inhibitions on the part of potential sources
8. It is recommended to define ‘acts of journalism’, as distinct from the role of ‘journalist’, in determining who can benefit from source protection laws
9. To optimise benefits, source protection laws should be strengthened in tandem with legal protections extended to whistleblowers, who constitute a significant set of confidential journalistic sources,
10. Journalists are increasingly adapting their practice in an effort to partially shield their sources from exposure, but steps to limit anonymity and encryption undermine these adaptations.
11. The financial cost of the digital era source protection threat is significant (in terms of digital security tools, training, and legal advice), as is its impact on the production and scope of investigative journalism based on confidential sources
12. There is a need to educate both journalists and citizens in digital safety
13. Journalists and others who rely on confidential sources to report in the public interest may need to train their sources in secure methods of contact and information-sharing

3.1. Identification of key themes

The data collated via the Environmental Scan process and qualitative interviews, many of which are referenced later, confirmed the existence of five key overlapping and inter-related

trends affecting the legal protection of journalists' sources in the digital age. These themes are visible in many legislative changes and incidents affecting journalists, as noted in Part 7 below. They are also reflected in the deliberations of regional courts, such as the European Court of Human Rights. It emerges from all these sources that the issue of confidentiality of journalistic sources in the digital age is bound up with:

- i. The 'trumping effect' of national security/anti-terrorism legislation
- ii. The role of mass surveillance and targeted surveillance in undercutting legal protections
- iii. The role of third party intermediaries and data retention
- iv. Changes in entitlement to protection – Who is a journalist?/What is journalism?
- v. Additional categories: Two other sub-themes emerged from the data.
 - Other digital dimensions (e.g. seizure of digital equipment; threats to anonymity and encryption)
 - Non-digital developments in source protection (e.g. legislative and case law developments not pertaining to the digital environment)

3.2. Analysis of key themes

i. The 'trumping effect' of national security/anti-terrorism legislation

In 2007, Banisar (p64) noted that: "A major recent concern...is the adoption of new anti-terrorism laws that allow for access to records and oblige assistance. There are also problems in many countries with searches of newsrooms and with broadly defined state secrets acts which criminalise journalists who publish leaked information".

The problem has grown in the intervening years, as a parallel to digital development, and occurs where it is un-checked by measures designed to preserve fundamental rights to freedom of expression and privacy, as well as accountability and transparency. In practice, this leads to what can be identified as a 'trumping effect', where national security and anti-terrorism legislation effectively take precedence over legal and normative protections for confidential journalistic sources (see Campbell 2013). Further, the classification of information as being protected by national security or anti-terrorism legislation has the effect of increasing the reluctance of sources to come forward.

One particular risk is signalled in a 2008 Council of Europe (CoE) report that stated: "Terrorism is often used as a talisman to justify stifling dissenting voices in the way that calling someone a communist or capitalist were used during the Cold War" (Banisar 2008). According to the COE report, following the 2001 terrorist attacks, many European countries adopted new laws or expanded the use of old laws to monitor communications.

Further perspective on the issue has come from Gillian Phillips, Director of Editorial Legal Services of *The Guardian* who has specifically referenced the implications of governments invoking national security and anti-terrorism measures that interfere with protections for journalists and their sources. Calls for unlimited monitoring and use of modern surveillance

technologies to access all citizens' data, directly challenge journalists' rights to protect their confidential sources, she said (Nolan 2015)

Interviewed for this study, the Director of the Centre for Law and Democracy in Canada, Toby Mendel, said that the main issue is the redefinition of national security in the current climate. "The problem is not so much new rules... but a changing understanding of national security. In particular, when national security becomes equated with the risk of terrorist actions, which can theoretically be undertaken by anyone, the issue becomes far more generalised, and so the risk to source protection becomes far more serious" (Mendel 2014).

Privacy International's Tomaso Falchetta, also speaking to this study's researchers, highlighted a major problem with regard to the impact of anti-terrorism and national security legislation on journalistic source protection:

...Most laws regulating interception and surveillance do not specifically recognise additional rights for journalists. This is particularly so with regards to counter-terrorism legislation that provides for expansive powers of state surveillance without making provisions for protection of journalists' sources. Traditional national security laws and new counter-terrorism laws adopted in numerous countries give authorities extensive powers to demand assistance from journalists, intercept communications, and gather information. (Falchetta 2015)

Falchetta also observed that, in many countries, journalists are held liable for the publication of information that they have received when it is judged to be in violation of state secrets acts or criminal codes.

While anti-terrorism legislation could be justifiably used in limited cases to override source protection laws, the existence of arbitrary or broad nature of such laws can put journalistic source confidentiality at risk. This complexity is evident in Australia, where national security and anti-terrorism grounds have been invoked to classify information on asylum seeker arrivals and detention, requiring most journalism undertaken on boat arrivals and immigration detention centres to be dependent upon confidential sources. However, as elucidated later in this study, revelation of any such classified information has now been criminalised (Farrell 2015b), exacerbating the chilling effect. Journalists have been reported to the Australian Federal Police by Australian government agencies with requests that the police assist with identifying the sources of the leaks (Farrell 2015a).

Like other experts interviewed about themes for this study, USA journalist and press freedom advocate Josh Stearns acknowledged that there are, in limited circumstances, security reasons for compelling journalists to reveal their sources. He cautioned, however, that "too often the blanket of national security is thrown over things that probably aren't a good fit or it is used too expansively" (Stearns 2014)

A report by *The Guardian* in 2015, based on files leaked by Edward Snowden, highlighted the potential controversy in this area. It stated that that a UK Government Communications Headquarters (GCHQ) information security assessment had listed "investigative journalists" alongside terrorists and hackers in a threat hierarchy (Ball 2015).

In Africa, *ARTICLE 19's* Henry Maina told the researchers that journalists and bloggers are frequently targeted in the context of national security measures (Maina 2015). Former Special Rapporteur on Freedom of Expression at the Inter-American Commission on Human Rights, Dr Catalina Botero, told this study that the role played by investigative journalism

in the fight against terrorism and organised crime is being undermined in Latin America through deployment of national security laws to the detriment of source protection:

You need to protect journalists in order to fight organised crime because you need [their work] to know what's going on. Sometimes in the Americas, journalists are more and better informed than the authorities. So you need them to fight against organised crime and at the same time you are using these kinds of laws to threaten them. We're killing one of the most important tools that governments need to fight organised crime, and you're not winning anything because spying on journalists is not going to give you any tool to fight against organised crime. (Botero 2015)

She stated that some governments use tools to block and threaten and spy on journalists. "Not because of security reasons, but because of the need to control what's going on in the public sphere" (Botero 2015).

Globally, these issues point to the need for law reform according to Media Legal Defence Initiative CEO Peter Noorlander. "Existing national security and search and seizure laws should be amended to strengthen source protection," he told this study (Noorlander 2015).

Other issues related to national security impact on whether a society provides for anonymity and encryption, which are enablers of the right to privacy, and which each have great relevance to the confidentiality of journalistic sources. Linked to these are real-name registration systems for electronic communication, which potentially expose reporters and their communications with sources to scrutiny. There is also a potential chilling effect on sources who may prefer to make contact with reporters via anonymous or pseudonymous accounts. This presents risks and difficulties for journalists trying to interact with confidential sources online – sources who may choose to make contact via journalists' personal social media accounts, including private and direct messaging. The same applies to the legal regime concerning encryption, which is also sometimes affected by national security considerations.

ii. The role of mass surveillance and targeted surveillance in undercutting legal protections

This theme is highlighted by a range of scholars (Fuchs 2013; Eubanks 2014; Giroux 2015) who have warned that surveillance is a broader problem than the impingement of individual privacy. Adrejevic (2014) has argued that it represents a fundamental alteration to the power dynamics of society:

...Surveillance should be understood as referring to forms of monitoring deeply embedded in structural conditions of asymmetrical power relations that underwrite domination and exploitation.

As discussed throughout this study, protection of journalistic sources is undercut if information leading back to sources is swept up through both mass surveillance and unchecked targeted surveillance deployed by States and other actors. Different kinds of physical surveillance have historically impacted on source protection, but digital data has enabled a higher magnitude of surveillance, and the advent of cheap storage and processing power makes bulk surveillance feasible and far-reaching. Director of the Canadian-based Centre for Law and Democracy, Toby Mendel told this study that digital surveillance undercuts source protection because it gets around legal controls on exposing

sources via indirect means (Mendel 2014). *ARTICLE 19's* Henry Maina told this study there were some countries where the deployment of surveillance techniques was a means of intercepting information that can be used to incriminate reporters (Maina 2015). Experts interviewed for this study indicated that surveillance could be legitimate, and pointed to the "Necessary and Proportionate" conditions put forward by civil society groups², but expressed concern about cases when there was a lack of legality, independent oversight, transparency or consideration for journalistic confidentiality.

Definitions

Mass surveillance can be defined as the broad, arbitrary monitoring of an entire or substantial fraction of a population (EFF 2015). According to former UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion, Frank La Rue, States can achieve almost complete control of telecommunications and online communications "...by placing taps on the fibre-optic cables, through which the majority of digital communication information flows, and applying word, voice and speech recognition..." (UNGA HRC 2013).

Privacy International's Tomaso Falchetta described the particular risks of mass surveillance to researchers on this study: "Mass digital surveillance is inherently untargeted, thereby collecting all types of information, often greater than those obtained by other legal means. The surveillance is likely to result in the interception of information about other sources, research on pending stories, and the personal life of the journalist" (Falchetta 2015).

A report of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, has outlined that States can gain access to the telephone and email content of an effectively unlimited number of users and maintain an overview of Internet activity associated with particular websites. "All of this is possible without any prior suspicion related to a specific individual or organisation. The communications of literally every Internet user are potentially open for inspection by intelligence and law enforcement agencies in the States concerned" (UN Doc A/69/397).

There is also concern about the extent of targeted surveillance, according to Emmerson's report: "Targeted surveillance...enables intelligence and law enforcement agencies to monitor the online activity of particular individuals, to penetrate databases and cloud facilities, and to capture the information stored on them" (UN Doc A/69/397).

In 2013, the Monk School of Global Affairs' Citizen Lab research group at the University of Toronto discovered command and control servers for FinFisher software (also known as FinSpy) backdoors, in a total of 25 countries, including 14 countries in Asia, nine in Europe and North America, one in Latin America and the Caribbean, and one in Africa (Marquis-Boire et al. 2013). This software is exclusively sold to governments and law enforcement agencies (Blue 2014).

The practice of 'outsourcing' the interception of citizens' communications to allied countries' national security agencies, in order to avoid domestic privacy and freedom of expression laws, may heighten the risks for journalistic source protection.

Additionally, several experts interviewed for this Study pointed out the lack of transparency connected to surveillance practices that target journalists, or catch them in the net.

2 <https://necessaryandproportionate.org/>

Belgian Media Law professor Dirk Voorhoof told this Study's researchers: "When it comes to monitoring online communications, the practices that are breaching the rights (associated with) protection of journalists' sources almost become invisible, and these practices are often to be situated in the nearly invisible actions of security and intelligence services". He described the lack of transparency, and associated lack of enforcement of source protection laws in the digital environment as a problem for democracy (Voorhoof 2015).

Trends in surveillance of journalists and their communications

A 2008 Council of Europe report (Banisar 2008) detailed what it described as a "worrying trend in the use of both authorised and unauthorised electronic surveillance to monitor journalists by governments and private parties to track their activities and identify their sources". According to the report, most such incidents are not related to countering terrorism but they are authorised under the broad powers of national laws or undertaken illegally, in an attempt to identify the sources of journalistic information.

These laws expand surveillance in a number of ways, according to the CoE study, such as:

1. Extending the range of crimes that interception is authorised for;
2. Relaxing legal limitations on approving and conducting surveillance including allowing for warrantless interception in some cases;
3. Authorising the use of invasive techniques such as Trojan horse and remote keystroke monitoring to be used;
4. Increased demand for identification of users of telecommunications services.

One case of the direct undercutting of confidential source protection by mass surveillance came in July 2015, in the context of a German parliamentary investigation into the surveillance of German citizens in 2011. During the course of questioning, a German intelligence chief revealed that *Der Spiegel* journalists had also been under surveillance and that an official from the service of an ally had revealed the identity of one of the journalists' confidential sources to the German government (Tapper 2015).

Documents linked to Edward Snowden, published by *The Guardian* in 2015, posited that the UK's GCHQ (Government Communications Headquarters) had syphoned emails from some of the world's top news organisations – the BBC, *The Guardian*, *Le Monde*, Reuters, *The New York Times* and *The Washington Post* among them – for internal distribution (Ball 2015).

Meanwhile, a US editor who responded anonymously to the first of three surveys connected to this study (Posetti 2014d) argued that mass surveillance meant that newsrooms could not protect the anonymity of sources anymore, and that sources could also expose themselves through their electronic communications.³ Similar concerns were expressed by Indonesian investigative journalist with TEMPO magazine, Wahyu Dhyatmika, and Pakistani investigative journalist Umar Cheema. In the Philippines, investigative journalist Marites Danguilan-Vitug, a co-founder of that country's Centre for Investigative Journalism, told the researchers that she believed her phone had been bugged, causing her to introduce additional security measures.

3 Such concerns have led to the defensive alteration of journalistic practices. See Thematic Study 1, and Part 9.e of this Study.

Founder of the Arabic Media Internet Network Daoud Kuttub told this study that he now operates on the assumption that everything he does is “being watched” and that governments and security services have access to his communications, and those of many other media actors in his region.

Mexican journalist, and World Editors Forum Special Adviser on Journalists’ Safety, Javier Garza Ramos said that journalists now operated under the assumption that they were under surveillance. (Garza 2015).

Also in an interview for this study, the editor of a major newspaper in the People’s Republic of China (PRC), said surveillance undermined his confidence in his ability to protect his sources (Yuan Zhen⁴ 2015).

US journalist Josh Stearns told this study that traditionally, journalists sought to protect sources through shield laws⁵, and that many of these were now dated (Stearns 2014).

According to Polish law academic Jan Podkowik (2014), surveillance undertaken without a journalist’s consent should be considered as an act of interference with the protection granted by Article 10 of the European Convention on Human Rights. He proposed in a 2014 paper that interference with journalistic confidentiality by means of secret surveillance should be recognised at least as equally onerous (or even more onerous) as searches of a home or a workplace. “... it seems that in the digital era, it is necessary to redefine the scope of the protection of journalistic privilege and to include in that scope all the data acquired in the process of communication, preparation, processing or gathering of information that would enable the identification of an informant,” Podkowik wrote.

iii. The role of third party intermediaries and data retention

A third theme that emerges from the literature, surveys, expert interviews and legal developments is that of data retention by third parties. Compounding the impacts of surveillance on source protection and confidential source-dependent journalism globally is the interception, capture and long term storage of data by third party intermediaries⁶. If ISPs, search engines, telcos, and social media platforms, for example, can be compelled to produce electronic records (stored for increasingly lengthy periods under mandatory data retention laws) that identify journalists’ sources, then legal protections that shield journalists from disclosing confidential sources may be undercut by backdoor access to the data.

A 2014 UN Office of the High Commissioner for Human Rights Report, *The Right to Privacy in the Digital Age* (see detailed discussion of this report in section 5.1 b below) concludes that there is a pattern of:

...increasing reliance of Governments on private sector actors to retain data ‘just in case’ it is needed for government purposes. Mandatory third-party data retention – a recurring feature of surveillance regimes in many States, where Governments require telephone companies

4 This is a pseudonym

5 Shield laws offer journalists the legal right not to disclose their sources

6 In the UNESCO publication *Fostering Freedom Online: The Role of Internet Intermediaries* (MacKinnon et al 2014), the authors cite the Organisation for Economic Co-operation and Development’s (OECD) definition of Internet intermediaries as entities that ‘bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.’ Most definitions of Internet intermediaries explicitly exclude content producers.

and internet service providers to store metadata about their customers' communications and location for subsequent law enforcement and intelligence agency access – appears neither necessary nor proportionate (OHCHR 2014).

Privacy International legal officer Tomaso Falchetta told researchers attached to this study that: “there is a growing trend of delegation by law enforcement of quasi-judicial responsibilities to Internet and telecommunication companies, including by requiring them to incorporate vulnerabilities in their networks to ensure that they are ‘wire-tap ready’” (Falchetta 2015). He pointed in this regard to the UN High Commissioner for Human Rights’ report on the right to privacy in the digital age (UN doc. A/HRC/27/37, 30 June 2014).

Limited judicial oversight of access to data is also an issue globally.

Mandatory data retention

Increasingly, States are introducing mandatory data retention laws. Such laws require telecommunications and Internet Service Providers to preserve communications data for inspection and analysis, according to a report of the Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (23 September 2014) (UN Doc A/69/397). In practice, this means that data on individuals’ telecommunication and Internet transactions are collected and stored even when no suspicion of crime has been raised (EFF 2011).

Australia’s Press Council Chair, Professor David Weisbrot has said that mandatory data retention legislation that fails to protect journalistic communications risks “crushing” investigative journalism:

I think that whistleblowers who are inside governments or corporations will definitely not come forward because their confidentiality and anonymity will not be guaranteed. If they came forward, a journalist would have to say ‘I have to give you some elaborate instructions to avoid detection: don’t drive to our meeting, don’t carry your cell phone, don’t put this on your computer, handwrite whatever you’re going to give me’ (Meade 2015)

Senior Lawyer with Australia’s Law Institute of Victoria, Leanne O’Donnell, told this study that the country has had no exemption for journalistic communications in data retention policies. She added that there were also no protocols that could assist ISPs, and other companies to determine if official handover requests apply to journalistic communications. There had been, therefore, no legal provision or practical protection for journalistic data, she stated⁷ (O’Donnell 2015).

The issue of access to journalistic data raises transparency issues. UK QC Gavin Millar, Chair of the Centre for Investigative Journalism at Goldsmith’s University in London, told this study that the process of accessing journalists’ data under the Regulation of Investigatory Powers Act (RIPA) in the UK involves judges, but not the journalists (Millar 2015).⁸

Metadata risks

Some of the data collected under these policies is known as metadata. Metadata is data that defines and describes other data. For the ISO (International Organisation for Standardisation) standard, metadata is defined as data that defines and describes other data and processes.

⁷ See discussion about new data retention legislation in Australia in the regional overviews section of this study

⁸ See part 9.3.2.c below for further discussion about transparency issues

(ISO/IEC FDIS 11179-1, 2004). In other words, as the Electronic Frontier Foundation's Peter Eckersley has put it, "Metadata is information about what communications you send and receive, who you talk to, where you are when you talk to them, the length of your conversations, what kind of device you were using and potentially other information, like the subject line of your emails" (EFF 2014). Metadata may also include geolocation information.

Advocates of long-term metadata retention insist that there are no significant privacy or freedom of expression threats.⁹ However, even when journalists encrypt the content, they may neglect the metadata, meaning they still leave behind a digital trail when they communicate with their sources. This data can easily identify a source, and safeguards against its illegitimate use are frequently limited, or non-existent (Noorlander 2015).

The need to include the metadata attached to journalistic communications in any limitations applied to the reach of data retention laws is also highlighted by the legal and legislative developments, along with a range of associated incidents identified later in this study. The Media Legal Defence Initiative director Peter Noorlander told the researchers that many legislators do not realise the very real threat to privacy and media freedom posed by the collection of metadata (Noorlander 2015). In an interview for this study, the Tow Center's Susan McGregor called for legislation in the USA to declare metadata private because of what it reveals about people's personal lives.

iv. Changes in entitlement to protection – Who is a journalist?/ What is journalism?

These questions are persistent and complex. On the one hand, broadening the legal definition of 'journalist' to ensure adequate protection for citizen reporters (working on and offline) is logical, and in some countries case law is catching up gradually on this issue of redefinition. However, on the other hand, it opens up debates about classifying journalists, and even about licensing and registering those who do journalism - debates that are particularly potent where there is a history of controls over press freedom.

Various scholars (c.f. Russell 2014), journalism organisations (Society of Professional Journalists 2013) and press freedom advocacy groups (Stearns 2013) have all recently recognised this change in the landscape and proposed that sources of journalism should be protected from legal repercussions by whistleblowing laws, for example, and not limiting the protection to journalists alone. In many dispensations without strong press freedom overrides, however, journalists themselves are liable for publication of leaked information, irrespective of source confidentiality issues. In such cases, they too need protection in terms of public interest defences being recognised in law and by the courts. In other words, confidentiality protection as such does not necessarily shield publication, even where it does assist sources to avoid identification. The significance of this is that where there are no other protections to complement confidentiality protection, there can nevertheless be a chilling of disclosures of public interest information.

Many stakeholders have argued in favour of legal protections being defined in connection with 'acts of journalism', rather than through the definition of the professional functions of a journalist. These have bearings on the protection of both journalists and sources in the digital age. In December 2013, the UN General Assembly adopted a resolution which

⁹ See for example Australian Attorney General George Brandis' defence of that country's data retention policies <http://www.skynews.com.au/culture/showbiz/tv/2015/03/23/metadata-grilling-gains-logie-nomination.html>

outlined a broad definition of journalistic actors that acknowledged that: "...journalism is continuously evolving to include inputs from media institutions, private individuals and a range of organisations that seek, receive and impart information and ideas of all kinds, online as well as offline, in the exercise of freedom of opinion and expression" (UNGA 2013: A/RES/68/163).

In 2014, the intergovernmental Council of UNESCO's International Program for the Development of Communications (IPDC) welcomed the UNESCO Director-General's Report on the Safety of Journalists and the Danger of Impunity, which uses the term 'journalists' to designate the range of "journalists, media workers and social media producers who generate a significant amount of public-interest journalism" (UNESCO 2014).

Many legal definitions of 'journalist' have been evaluated as overly narrow, as they tend to emphasise official contractual ties to legacy media organisations, may demand a substantial publication record, and/or require significant income to be derived from the practice of journalism. This leaves confidential sources relied upon by bloggers and citizen journalists largely unprotected, because these producers of journalism are not recognised as 'proper journalists'; even when their output is clearly public interest journalism. Such definitions also exclude the growing group of academic writers and journalism students, lawyers, human rights workers and others, who produce journalism online, including investigative journalism.

There are many parallels between investigative journalism and the work undertaken by human rights organisations – organisations that depend upon confidential sources for information about human rights abuses. Such organisations now also often publish directly to audiences and are arguably engaged in 'acts of journalism'. This has bearing on a controversy in 2015 in which *Amnesty International* objected to having been a subject of surveillance (*Amnesty International* 2015a, 2015b).

The Arabic Media Internet Network's Dauoud Kuttab does not want to limit entitlement to source protection to recognised journalists, but to extend it to citizens as well (Kuttab 2015). Egyptian Media Studies Professor Rasha Abdullah said that source protection needs to be accessible to a broad range of communications actors: "It should apply to anyone who has information to expose, particularly in the age of digital media" (Abdullah 2014). However, for Arab Reporters for Investigative Journalism's (ARIJ) Rana Sabbagh, "There is a difference between reporting the news, writing an editorial, and being an activist" (Sabbagh 2015). Nevertheless, she stated that: "...credible bloggers who are using reliable documents and are exposing corruption and injustice have to have some form of protection".

USA media lawyer Charles Tobin is also in favour of a broad definition of journalism as a response to the rise of citizen journalists and bloggers (Tobin 2014). In 2013, the USA's Society of Professional Journalists passed a unanimous motion that "strongly rejects any attempts to define a journalist in any way other than as someone who commits acts of journalism". Karen Russell (2014), in her analysis of attempts to define "journalist" in the context of USA shield law debates, argued that: "Shield laws should be designed to protect the process through which information is gathered and provided to the public, not the status of the individual or institution collecting it". She noted that a number of jurisdictions in the USA already define journalism in such a way. In the state of Nebraska, for example, the shield law states "[n]o person engaged in procuring, gathering, writing, editing, or disseminating news or other information to the public" shall be required to disclose a confidential source or information provided by that source in any federal or state proceeding.

In the view of USA journalist Josh Stearns: “we need to look at the acts of journalism rather than defining a particular type of person...defining an act is safer and more consistent with how media is created and consumed today, and (it) provides a stronger basis for protection.” He further told this study that: “Even those who are blessed with journalism jobs and would fit all the qualifications that would protect such a person under law may not act in such a way as deserves protection. By orienting around an act, and protection of an act, we then hopefully establish actions that are for the public interest and have all these sets of qualities rather than just protect a person who automatically lumps in and excludes people who should otherwise be included” (Stearns 2014)

Moving the framework to a protection of ‘acts of journalism’ rather than limiting it to the work of professional journalists is a conceptual shift, according to Stearns in a 2013 report:

While there is an emerging consensus on protecting acts of journalism, how we define those acts is contested terrain. It raises questions about whether there is indeed an act of journalism we can differentiate from other acts. Given how much flux exists in the journalism world, how can we create boundaries around an idea while leaving enough flexibility to account for an unknown future?

Central to these debates is the deployment of a ‘public interest test’ as a measure for assessing the entitlement for a journalistic actor to claim access to source protection frameworks. The term ‘in the public interest’¹⁰, as it applies to acts of journalism, is not clearly defined and it is a complex concept (see discussion in Thematic Study 3). It may, in some cases, have the effect of inadvertently excluding certain acts of journalism from source protection provisions. This concept may need further interrogation in reference to the development of shield laws, and it points to the need for a case-by-case assessment of the specific journalistic acts for which confidentiality is sought.

3.3. Key themes analysis: Summary

The four themes above are the key digital era issues emerging from the research undertaken for this study. They are distinct, though inter-related, themes for understanding the evolving regulatory environment and the regional analyses that follow below. In a nutshell, they are patterns in terms of which: 1) source protection laws are at risk of being trumped by national security and anti-terrorism legislation that increasingly broadens definitions of ‘classified information’ and limits exceptions for journalistic acts, 2) The widespread use of mass and targeted surveillance of journalists and their sources undercuts legal source protection frameworks by intercepting journalistic communications, 3) Expanding requirements for third party intermediaries to mandatorily retain citizens’ data for increasingly lengthy periods of time further exposes journalistic communications with confidential sources 4) debates about digital media actors’ entitlement to access source protection laws where they exist, while being more prominent in Western contexts, are intensifying around the world. These themes inform the regional catalogue of developments affecting legal source protection frameworks – including legislative changes, judicial precedents, incidents and revelations –

10 Moore (2007) Argues that public interest journalism has two elements: 1. “...it is as a watchdog, holding the powerful to account, exposing fraud, deceit, corruption, mismanagement and incompetence. ... This watchdog role is (also) important...because those in power know they’re being held to account”. 2. “This is the responsibility to inform, explain and analyse. Public-interest journalists find, digest and distil information that helps the public form views and make decisions” (Moore, M “Public interest, media neglect” in *British Journalism Review* (Sage) vol. 18 no.2, June 2007.)

that follow. Also examined below are other digital aspects such as the seizure of technical equipment and legal developments not linked specifically to digital dimensions.

It is relevant to begin examining the way in which international regulations and norms impact on these themes, especially from the vantage point of looking at those developments that have a close bearing on the confidentiality of source protection.

4. International Regulatory and Normative Environments

“There is widespread recognition in international agreements, case law and declarations that protection of journalists’ sources [are] a crucial aspect of freedom of expression that should be protected by all nations” (Banisar 2007: p13).

As elaborated later in this study, the United Nations (including UNESCO), Organisation of American States, African Union, Council of Europe, and the Organization for Security and Co-operation in Europe (OSCE) have specifically recognised journalists’ right to protect their sources. Further, the European Court of Human Rights (ECtHR) has found in several cases that it is an essential component of freedom of expression.

As Banisar (2007: 13) noted, the international instruments concur that the protection of sources is “indispensable” and a “basic condition for press freedom. Such protection is viewed as necessary to ensure the free flow of information - an essential element of several international human rights agreements.” Without it, the media will not be able to effectively gather information, and provide the public with information, and act as an effective watchdog”. The presumption made is that “exceptional circumstances” are required to justify disclosure of journalists’ confidential sources. Accordingly, the need for information about the source must be judged as essential, and only in cases where there is a ‘vital interest’ can disclosure be justified.

The terms of this Study required a review of existing global and regional instruments (including laws, statements and declarations) to identify any changes in law, and within the normative environment, along with an assessment of their digital relevance in 2015.

The global instruments assessed for relevance to source protection are grouped under the jurisdiction of:

- United Nations (including UNESCO)
- European institutions:
 - a) The Council of Europe (CoE), including the European Court of Human Rights (ECtHR)
 - b) European Union (EU), including the European Court of Justice
- Organisation for Security and Co-operation in Europe (OSCE)
- Organisation for Economic Cooperation and Development (OECD)
- Organisation for American States (OAS)
- African Union (AU)

This study will focus on mapping developments between 2007-2015 that are relevant to journalistic source protection, while identifying emerging digital dimensions in evidence.

4.1. United Nations Actors

a. Resolutions

- *2012: Resolution adopted by the UN Human Rights Council (A/HRC/RES/20/8) on the promotion, protection and enjoyment of human rights on the Internet that recognise the need to uphold people's rights equally regardless of environment*

The resolution affirmed that: "the same rights that people have offline must also be protected online". This represents important support for extending legal source protection provisions for analogue journalistic processes to the digital realm.

- *2012: Human Rights Council resolution (A/HRC/RES/21/12 on the safety of journalists.*

This Resolution stressed "the need to ensure greater protection for all media professionals and for journalistic sources" (UN Human Rights Council, 2012).

- *2013: Resolution adopted by the UN General Assembly (A/RES/68/163) on the Safety of Journalists and Issue of Impunity (2013)*

This resolution acknowledges that "...journalism is continuously evolving to include inputs from media institutions, private individuals and a range of organisations that seek, receive and impart information and ideas of all kinds, online as well as offline, in the exercise of freedom of opinion and expression, in accordance with article 19 of the International Covenant on Civil and Political Rights thereby contributing to the shaping of public debate" (UN GA 2013).

This resolution is directly relevant to this study in two ways: a) It acknowledges shifts in definitions of 'journalism' that are relevant to debates about who is entitled to invoke source protection, and b) it acknowledges the value of journalism to the public interest.

It further noted with appreciation the UN Plan of Action on the Safety of Journalists and Issue of Impunity. In turn, it is significant that the Plan states:

Efforts to end impunity with respect to crimes against journalists must be associated with the defence and protection of human rights defenders, more generally. In addition, the protection of journalists should not be limited to those formally recognised as journalists, but should cover others, including community media workers and citizen journalists and others who may be using new media as a means of reaching their audiences.

- *In November 2013, the 37th session of the UNESCO General Conference passed a Resolution on 'Internet-related issues: including access to information and knowledge, freedom of expression, privacy and ethical dimensions of the information society' (UNESCO 2013).*

This resolution formally recognised the value of investigative journalism to society, and the role of privacy in ensuring that function. "... (P)rivacy is essential to protect journalistic sources, which enable a society to benefit from investigative journalism, to strengthen good governance and the rule of law, and that such privacy should not be subject to arbitrary or unlawful interference," the resolution reads in part.

- *In December 2013 the United Nations General Assembly (UNGA) adopted a resolution on the Right to Privacy in the Digital Age. (A/C.3/68/167)*

Resolution 68/167 was co-sponsored by 57 Member States and it called upon all States to "... respect and protect the right to privacy including in the context of digital communication. ... To take measures to put an end to violations of those rights and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law".

The Resolution expressed 'deep concern' "...at the negative impact that surveillance and/or interception of communications, including extraterritorial surveillance and/or interception of communications, as well as the collection of personal data, in particular when carried out on a mass scale, may have on the exercise and enjoyment of human rights".

It also called upon States: "To review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law" and "To establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data," emphasising the need for States to ensure the full and effective implementation of their obligations under international human rights law (OHCHR 2014).

The General Assembly further requested the United Nations High Commissioner for Human Rights to submit a report on "the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale". The Assembly, in line with the 2012 Human Rights Council resolution (UN Doc. A/HRC/RES/20/8), also affirmed: "That the same rights that people have offline must also be protected online, including the right to privacy".

Through its calls to protect the right to privacy, including in the context of digital communications, this UNGA resolution is relevant to source protection. The right to privacy online applies also to journalists, and it can be invoked to support investigative journalism via their dealings with confidential sources. Whistleblowers – a prominent subset of journalists' confidential sources – are more likely to communicate with journalists directly online if journalists can rely on their right to privacy to help shield their professional communications.

- *2014: Resolution adopted by the UN Human Rights Council (A/HRC/RES/27/5) on the Safety of Journalists*

The resolution acknowledged "the particular vulnerability of journalists to becoming targets of unlawful or arbitrary surveillance and/or interception of communications, in violation of their rights to privacy and to freedom of expression".

This observation has direct application to the issues of source protection and the safety of journalists and their sources.

- *December 2014: UN General Assembly Resolution on The safety of journalists and the issue of impunity freedoms (A/RES/69/185)*

This UNGA resolution is relevant to this study, as it reiterates two observations pertinent to the implications of mass surveillance and questions of defining acts of journalism:

***Acknowledging** that journalism is continuously evolving to include inputs from media institutions, private individuals and a range of organisations that seek, receive and impart information and ideas of all kinds, online as well as offline, in the exercise of freedom of opinion and expression, in accordance with article 19 of the International Covenant on Civil and Political Rights, thereby contributing to the shaping of public debate (Reaffirming the 2013 UNGA Resolution 163 above)*

***Acknowledging** also the particular vulnerability of journalists to becoming targets of unlawful or arbitrary surveillance or interception of communications in violation of their rights to privacy and to freedom of expression (Reaffirming the UN HRC resolution of 2014 above).*

b. Reports, recommendations, statements and comments

- ***July 2011: Office of the International Covenant on Civil and Political Rights UN Human Rights Committee, General Comment no. 34***

This comment recognises protection of all forms of expression and the means of their dissemination, including electronic and Internet-based modes of expression.

...Freedom of opinion and freedom of expression are indispensable conditions...essential for any society. They constitute the foundation stone for every free and democratic society, and form the basis for the full enjoyment of a wide range of other human rights. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint.

- ***2012: Carthage Declaration - participants at the UNESCO World Press Freedom Day conference:***

This declaration highlights the significance of the challenges posed by Internet communications to the maintenance of freedom of expression and privacy rights essential to the practice of investigative journalism.

Noting the Report to the Human Rights Council of 2011 by the UN Special Rapporteur for Freedom of Opinion and Expression with respect to access to Internet and the right of all individuals to freedom of expression, including through the Internet (A/HRC/17/27)

Calls on UNESCO to:

Coordinate dialogue among Member States and other stakeholders on the human rights implications of social networks and new media for freedom of expression, privacy, and personal data protection.

- ***June 2013: 'Report of the Special Rapporteur (Frank La Rue) on the Promotion and Protection of the Right to Freedom of Opinion and Expression' to the Human Rights Council (A/HRC/23/40)***

This Report states: “Journalists must be able to rely on the privacy, security and anonymity of their communications. An environment where surveillance is widespread, and unlimited by due process or judicial oversight, cannot sustain the presumption of protection of sources”. It further notes: “States cannot ensure that individuals are able to freely seek and receive information or express themselves without respecting, protecting and promoting their right to privacy.” (La Rue 2013).

This statement highlights the relationship between the rights to freedom of expression, and access to information and privacy that underpins source protection.

- ***In July 2013, the then UN High Commissioner for Human Rights, Navi Pillay spotlighted the right to privacy in protecting individuals who reveal human rights implicated information.***

“[Edward] Snowden’s case has shown the need to protect persons disclosing information on matters that have implications for human rights, as well as the importance of ensuring respect for the right to privacy,” Pillay said (UN 2013 b). She added that national legal systems must ensure avenues for individuals disclosing violations of human rights to express their concern, without fear of reprisals.

Although the protection of journalistic confidentiality does not necessarily encompass protection of the source’s act of disclosure, fear of reprisal is a factor that affects a source’s confidence in a journalist’s commitment to keep confidentiality. In this way, an increased fear of reprisal can increase the ‘chilling effect’.

Pillay declared that the right to privacy, the right of access to information, and freedom of expression are closely linked. “The public has the democratic right to take part in public affairs and this right cannot be effectively exercised by solely relying on authorized information”.

This point is relevant to source protection because much investigative journalism is dependent upon ‘unauthorised’ sources - that is, sources who have not been cleared by government, organisational or corporate agencies to comment.

Pillay also explicitly pointed to the need for people “to be confident that their private communications are not being unduly scrutinised by the State”.

The consequence of an absence of such confidence represents a ‘chilling effect’ on sources that could, in turn, lead to the freezing of the ‘information pipe’.

Pillay’s statement has added relevance to source protection as Edward Snowden initially made his revelations to Guardian journalist/blogger Glenn Greenwald and The Washington Post as a confidential source (Greenwald 2014).

- ***In February 2014, the UN hosted an international expert seminar on the Right to Privacy in the Digital Age (Geneva)***

During this seminar, Frank La Rue (then UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), called for a special United Nations mandate for protecting the right to privacy. “Privacy and freedom of expression are not only linked, but are also facilitators of citizen participation, the right to free press, exercise of free opinion, and the possibility of gathering individuals, exercising the right to free association, and to be able to criticise public policies,” he said.

- *July 2014 - Summary of the Human Rights Council panel discussion on the safety of journalists: Report of the Office of the United Nations High Commissioner for Human Rights*

The Summary noted that: "A recurrent issue raised during the discussion was the question of whether the current legal framework was sufficient for ensuring the safety and protection of journalists and media workers. The issue was looked at in terms of both the physical protection against threats and violence and protection against undue interference, including legal or administrative" (UN HRC: 2014).

Further, the summary noted that the emergence of new forms of journalism (including social networks and blogs) has led to "greater vulnerability of the media, including illegal interference in the personal lives and activities of journalists. Such interference was to be condemned and the independence of the traditional and digital media supported" (UN HRC 2014, p11).

These points are relevant to journalists' right to receive and report information obtained from confidential sources in the public interest, without interference.

According to the Summary, the then UN HRC Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, stated that privacy and anonymity of journalists were also vital elements to ensuring press freedom.

Speakers also noted that: "bloggers, online journalists and citizen journalists played an important role in the promotion of human rights... [and] stated that the protection of journalists should cover all news providers, both professional and non-professional". This is relevant to the issue of the application of legal protection for journalists' sources.

Finally, the meeting heard that national security and anti-terrorism laws should not be used to silence journalists (UN HRC 2014 a p15).

- *2014 UNESCO World Trends in Freedom of Expression and Media Development report*

The threat of surveillance to journalism is underlined in this global report which highlights the role of national security, anti-terrorism and anti-extremism laws as instruments "...used in some cases to limit legitimate debate and to curtail dissenting views in the media, while also underwriting expanded surveillance, which may be seen to violate the right to privacy and to jeopardize freedom of expression" (UNESCO: 2014c).

This report further notes that:

National security agencies across a range of countries have gained access to journalists' documents, emails and phone records, as well as to massive stores of data that have the potential to enable tracking of journalists, sources and whistleblowers

- *July 2014: 'The right to privacy in the digital age: Report of the Office of the United Nations High Commissioner for Human Rights'*

The UN General Assembly mandated this report on protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale (OHCHR: 2014 p1).

The Report found that in the digital era, communications technologies have enhanced the capacity of “Governments, enterprises and individuals to conduct surveillance, interception and data collection”.

It also acknowledged that:

Concerns have been amplified following revelations in 2013 and 2014 that suggested that, together, the National Security Agency (NSA) in the United States and General Communications Headquarters (GCHQ) in the United Kingdom of Great Britain and Northern Ireland have developed technologies allowing access to much global internet traffic, calling records, individuals’ electronic address books and huge volumes of other digital communications content.

It is evident that the risks posed by these emerging digital dimensions to the preservation of legally enshrined protections for journalists’ confidential sources are significant.

The Report quoted the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion, who said that technological advancements mean that States’ effectiveness in undertaking surveillance is no longer limited by factors such as scale or the duration of an operation:

The State now has a greater capability to conduct simultaneous, invasive, targeted and broad-scale surveillance than ever before. In other words, the technological platforms upon which global political, economic and social life are increasingly reliant are not only vulnerable to mass surveillance, they may actually facilitate it. (OHCHR 2014 p3)

The Report also acknowledged that the problem of surveillance is widespread globally: “Examples of overt and covert digital surveillance in jurisdictions around the world have proliferated, with governmental mass surveillance emerging as a dangerous habit, rather than an exceptional measure”.

Further, there are also flow-on factors affecting third party intermediaries, according to the Report:

Governments reportedly have threatened to ban the services of telecommunication and wireless equipment companies unless given direct access to communication traffic, tapped fibre-optic cables for surveillance purposes, and required companies systematically to disclose bulk information on customers and employees. Furthermore, some have reportedly made use of surveillance of telecommunications networks to target political opposition members and/or political dissidents. There are reports that authorities in some States routinely record all phone calls and retain them for analysis, while the monitoring by host Governments of communications at global events has been reported. Authorities in one State reportedly require all personal computers sold in the country to be equipped with filtering software that may have other surveillance capabilities. Even non-State groups are now reportedly developing sophisticated digital surveillance capabilities. Mass surveillance technologies are now entering the global market, raising the risk that digital surveillance will escape governmental controls.

The Report also stated: “Practices in many States have...revealed a lack of adequate national legislation and/or enforcement, weak procedural safeguards, and ineffective oversight, all of which have contributed to a lack of accountability for arbitrary or unlawful interference in the right to privacy” (OHCHR 2014: pp15-16).

There are clear implications for source protection in the context of such unchecked surveillance and data retention.

The risks of 'big data' are also highlighted in the Report: "...a reality of big data is that once data is collected, it can be very difficult to keep anonymous. While there are promising research efforts underway to obscure personally identifiable information within large data sets, far more advanced efforts are presently in use to re-identify seemingly 'anonymous' data. Collective investment in the capability to fuse data is many times greater than investment in technologies that will enhance privacy". Furthermore, the Report noted that "...focusing on controlling the collection and retention of personal data, while important, may no longer be sufficient to protect personal privacy", in part because "big data enables new, non-obvious, unexpectedly powerful uses of data" (OHCHR: 2014 p6).

The issue of metadata collection (e.g. data that indicates patterns of behaviour - such as the number of calls between two individuals and the timing of the calls, rather than the content) is also highly relevant to source protection: "The aggregation of information commonly referred to as 'metadata' may give an insight into an individual's behaviour, social relationships, private preferences and identity that go beyond even that conveyed by accessing the content of a private communication," (OHCHR: 2014 p7), the Report continued: "The chilling effect on confidential sources, given the risk of profiling and exposure posed by the combination of data retention and the implications of big data analysis, is therefore further exacerbated.

The Report further proposed that: "...Even the mere possibility of communications information being captured creates an interference with privacy, with a potential chilling effect on rights, including those to free expression and association" (OHCHR: 2014 p7) It also stated: "...the onus is on the Government to demonstrate that interference is both necessary and proportionate to the specific risk being addressed. Mass or 'bulk' surveillance programmes may thus be deemed to be arbitrary, even if they serve a legitimate aim and have been adopted on the basis of an accessible legal regime". In other words,

...it will not be enough that the measures are targeted to find certain needles in a haystack; the proper measure is the impact of the measures on the haystack, relative to the harm threatened; namely, whether the measure is necessary and proportionate. (OHCHR: 2014 p9).

The Report concluded that there is a pattern of governments increasingly relying on private sector actors to retain data (often in the context of mandatory data retention legislation that is a common feature of surveillance programs) 'just in case'. It stated that such measures are neither 'necessary', nor 'proportionate'.

Citing a European Court of Human Rights ruling, the report declared the onus should be on the State to ensure that any interference with the right to privacy, family, home or correspondence is authorised by laws that "...are sufficiently precise, specifying in detail the precise circumstances in which any such interference may be permitted, the procedures for authorising, the categories of persons who may be placed under surveillance, the limits on the duration of surveillance, and procedures for the use and storage of the data collected; and provide for effective safeguards against abuse" (OHCHR: 2014, p10). This prompts the question: Should journalists be excluded from mass surveillance? Is this feasible? And how would journalists/journalism be defined for the purpose of considering such exemptions?

As observed in the report, there is an emerging practice of States to outsource surveillance tasks to others. "There is credible information to suggest that some governments have systematically routed data collection and analytical tasks through jurisdictions with weaker safeguards for privacy. Reportedly, some governments have operated a transnational network of intelligence agencies through interlocking legal loopholes, involving the coordination of surveillance practice to outflank the protections provided by domestic legal regimes...States have also failed to take effective measures to protect individuals within their jurisdiction against illegal surveillance practices by other States or business entities, in breach of their own human rights obligations" (OHCHR: 2014 p10).

"If there is uncertainty around whether data are foreign or domestic, intelligence agencies will often treat the data as foreign (since digital communications regularly pass 'off-shore' at some point) and thus allow them to be collected and retained". The result is significantly weaker – or even non-existent – privacy protection for foreigners and non-citizens in a country, as compared with those of citizens (OHCHR: 2014, p12). The practice of States sharing their intelligence and bypassing limits on surveilling their own citizens themselves has evident implications for journalists, especially foreign correspondents and journalists conducting international investigations.

The role of third party intermediaries is also referenced in this report. "...Given the growing role of third parties, such as Internet service providers, consideration may also need to be given to allowing such parties to participate in the authorisation of surveillance measures affecting their interests, or allowing them to challenge existing measures" (OHCHR: 2014 p13).

This is an important new dimension relevant to journalists' source protection, as there are increasing pressures on third party intermediaries which may have access to journalists' 'private' digital dealings with confidential sources (such as search engines, ISPs, telcos, and social networks) to hand data over to governments and corporations – in the context of either court proceedings or extra-judicial approaches. This process is increasingly formalised. As telecommunications service provision shifts from the public sector to the private sector, there has been a "delegation of law enforcement and quasi-judicial responsibilities to Internet intermediaries...The enactment of statutory requirements for companies to make their networks 'wiretap-ready' is a particular concern, not least because it creates an environment that facilitates sweeping surveillance measures" (OHCHR p15).

The report also stated: "On every continent, Governments have used both formal legal mechanisms and covert methods to gain access to content, as well as to metadata" (OHCHR: 2014, p14).

- *November 2014: UNESCO International Program for the Development of Communication (IPDC) Council decision*

In 2014, the IPDC's 39 Member-State council welcomed the UNESCO Director-General's Report on the Safety of Journalists and the Danger of Impunity, which states that it uses the term 'journalists' to designate the range of "journalists, media workers and social media producers who generate a significant amount of public-interest journalism". The Council also reaffirmed the importance of condemnations of "the killings of journalists, media workers and social media producers who are engaged in journalistic activities and who are killed or targeted in their line of duty".

- **July 2015: UNESCO study “Keystones for the Internet”**

The finalised UNESCO study, which was informed by preliminary research flowing from ‘Protecting Journalism Sources in the Digital Age’, proposed to UNESCO’s 195 Member States that they: “Recognise the need for enhanced protection of the confidentiality of sources of journalism in the digital age” (UNESCO 2015). This was also contained in the Outcome Document of the “Connecting the Dots: Options for Future Action” conference convened by UNESCO in 3-4 March 2015. (The point was endorsed at the 38th General Conference of UNESCO’s Member States in November 2015 as part of the overall options for a comprehensive agenda of UNESCO’s approach to Internet issues.) Responses to the survey attached to this study signalled the importance of UN positions on the issue of journalistic source protection.

- **May 2015: UN Office of the High Commissioner for Human Rights (OHCHR) Report on Encryption, Anonymity and the Human Rights Framework by UN Special on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye (Kaye 2015)**

This report from the new Special Rapporteur emphasises the essential roles played by encryption and anonymity. According to Kaye, these defences – working separately or together - create a zone of privacy to protect opinion from outside scrutiny. He noted the particular importance of the role they play in hostile political, social, religious and legal environments. “Where States impose unlawful censorship through filtering and other technologies, the use of encryption and anonymity may empower individuals to circumvent barriers and access information and ideas without the intrusion of authorities”. With particular relevance to this study, he highlighted the value of anonymity and encryption to journalists seeking to protect their confidential sources and their communications with them. “Journalists, researchers, lawyers and civil society rely on encryption and anonymity to shield themselves (and their sources, clients and partners) from surveillance and harassment”.

A related issue addressed by Kaye is a trend involving States seeking to combat anonymity tools, such as Tor, proxies and VPNs, by denying access to them. Such moves can directly undermine attempts to protect confidential journalistic sources in the context of digital communications.

Kaye also acknowledged that many States recognise the lawfulness of maintaining the anonymity of journalists’ sources. However, he reports that: “States often breach source anonymity in practice, even where it is provided for in law”, highlighting the pressures on journalists that undermine these legal provisions – either directly, or progressively.

Another issue the Special Rapporteur also noted is the increasing prevalence and impact of compulsory SIM card registration on confidential communications, including those between journalists and their sources: “Such policies directly undermine anonymity, particularly for those who access the Internet only through mobile technology. Compulsory SIM card registration may provide Governments with the capacity to monitor individuals and journalists well beyond any legitimate government interest.”

Kaye concluded that States should support and promote strong encryption and anonymity, and he specifically recommended strengthened legal and legislative provisions to enable secure journalistic communications. “Legislation and regulations protecting human rights

defenders and journalists should also include provisions enabling access and providing support to use the technologies to secure their communications.”

Summary

United Nations actors have been much engaged in debate about the implications of the emerging digital age threats to legal source protection frameworks. They have commissioned research, initiated inquiries and formulated resolutions relevant to the issues at the core of this study, namely the impacts of surveillance, national security/anti-terrorism legislation, data retention, the role of third party intermediaries, and shifts in entitlement to access protections connected to redefinitions of journalism.

5. Regional Instruments of Human Rights Laws and Normative Frameworks

5.1. European institutions

"The recognition of protection of journalistic sources is fairly well established in Europe both at the regional and domestic levels. For the most part, the protections seem to be respected by authorities...and direct demands to [expose] sources seem more the exception than the common practice" (Banisar: 2007). However, as Banisar also noted when he wrote:

...There are still significant problems. Many of the national laws are limited in scope, or in the types of journalists that they protect. The protections are being bypassed in many countries by the use of searches of newsrooms and through increasing use of surveillance. There has also been an increase in the use of criminal sanctions against journalists, especially under national security grounds for receiving information from sources.

Since then, European organisations and law-making bodies have made significant attempts at a regional level to identify the risks posed to source protection in the changing digital environment, and to mitigate these risks.

a. European Court of Human Rights (Ecthr) and European Union Court of Justice Judgements

- *November 2007: European Court of Human Rights (ECtHR) - Tillack v Belgium (20477/05)*

This case, which dates back to 2002, involved a leak investigation targeting an investigative journalist. Investigators seized 16 crates of papers, two boxes of files, two computers, four mobile telephones and a metal cabinet from the journalist's home and workplace with judicial approval. The journalist argued in the case that the judicial authorities were prohibited from taking measures or decisions intended to force journalists or organs of the press to reveal their sources.

The ECtHR found that the reasons cited for the searches were not sufficient to justify the seizure of the journalists' material, noting the quantity of documents and other items seized. Its judgment concluded that the authorities acted disproportionately and breached the journalist's right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights. The Court made the following statement about the importance of source protection in its judgement:

... the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution. This applies all the more in the instant case, where the suspicions against the applicant were based on vague, unsubstantiated rumours, as was subsequently confirmed by the fact that he was not charged (par 65)

- *February 2008: European Court of Human Rights (ECtHR) Guja v. Moldova (14277/04)*

This judgement found in favour of Jacob Guja, the former head of the Press Department of the Moldovan Prosecutor General, who had served as a whistleblower to a newspaper regarding cases of alleged political interference with the justice process, supplying two letters from public officials to journalists. In the course of a 2003 leak investigation that followed publication of stories based on the letters, Guja admitted that he was the source, and was dismissed from his position shortly afterwards. In February 2008 the Court ruled that that Guja acted in good faith as a confidential source and ordered he be reinstated to his position. This was the first such whistleblower case to reach the ECtHR. However, after being briefly reinstated, Guja was once again dismissed. At the time of writing, his case was under review by the CoE's Committee on the Execution of Judgements (Noorlander 2014).

- **December 2009: European Court of Human Rights (ECtHR) *Financial Times Ltd and others v. The United Kingdom* (821/03)**

In 2009, the European Court of Human Rights (ECtHR) ruled that the *Financial Times*, *The Guardian*, *The Times*, *The Independent* and Reuters were right to protect their sources by rejecting a UK High Court order for them to turn over leaked documents connected to a takeover bid involving a brewing company. The company began action to seize *The Guardian's* assets. The publishers argued that they were obliged to protect their sources and cited their freedom of expression rights under Article 10 of the European Convention on Human Rights. The ECtHR ultimately ruled that:

...the threat of damage [to the company] through future dissemination of confidential information and in obtaining damages for past breaches of confidence were, even if considered cumulatively, insufficient to outweigh the public interest in the protection of journalists' sources...

- **September 2010: European Court of Human Rights (ECtHR), Grand Chamber Appeal - *Sanoma Uitgevers B.V. v The Netherlands***

In a landmark Grand Chamber judgement, the ECtHR declared illegal the seizure by the Dutch police of a journalist's CD of photographs, which identified confidential sources.

The Court had ruled in 2003 that although the seizure could have a 'chilling effect' on press freedom, the police were pursuing a legitimate aim in seizing the CD because it contained relevant information that could lead to the identification of alleged criminals. The publisher subsequently appealed the case to the Grand Chamber and it found that the seizure was not lawful because it breached Article 10 of the European Convention on Human Rights. It also found that independent oversight was lacking in the case, leading to an absence of adequate legal safeguards to ensure an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources (NJCM 2010).

In its judgement, the Grand Chamber stated:

The right of journalists to protect their sources is part of the freedom to "receive and impart information and ideas without interference by public authorities" protected by Article 10 of the Convention and serves as one of its important safeguards. It is a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press

may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected.

In its conclusion, the Grand Chamber also highlighted that:

...orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources

It also made specific statements on the importance of independent judicial oversight as a safeguard in processes that lead to access to journalistic communications:

First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing-over of such material and to prevent unnecessary access to information capable of disclosing the source's identity if it does not.

- **November 2012: European Court of Human Rights (ECtHR) *Telegraaf Media Nederland Landelijke Media b.v. and others v. the Netherlands* (Application no. 39315/06)**

The complaint in this case was brought by a Dutch newspaper and two of its journalists. The journalists had been under investigation after publishing stories in *De Telegraaf* about the circulation of state secrets, in the form of documents from the Netherlands' secret service (AIVD). AIVD lodged a criminal complaint concerning unlawful disclosure of State secrets and an order was sought to force the journalists to hand over documents connected to the relevant stories. Those documents were initially sealed to prevent finger print analysis while legal challenges ensued. The journalists were jailed for three days in 2006, after refusing to answer questions of a judge in a criminal hearing involving three people charged with involvement in leaking the AIVD documents.

Further, according to the ECtHR judgement, the journalists were placed under surveillance by security operatives from the time the leak investigation began. "The present case is characterised precisely by the targeted surveillance of journalists in order to determine from whence they have obtained their information," the judgement reads. The surveillance orders were not the subject of independent oversight or judicial review according to the Court. Importantly, in terms of securing source confidentiality rights in the context of surveillance used against journalistic actors, the court noted the importance of prior independent review of surveillance requests as they apply to journalistic actors. It stated: "Moreover, review post factum, whether by the Supervisory Board, the Committee on the Intelligence and Security Services of the Lower House of Parliament or the National Ombudsman, cannot restore the confidentiality of journalistic sources once it is destroyed."

Ultimately, the Court found that the journalists' rights under both Articles 8 and 10 of the European Convention on Human Rights had been violated: "...the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their journalistic sources".

- *April 2014: European Union Court of Justice judgement (Ireland Data Retention Directive)*

The Court observed, in its judgment declaring the Data Retention Directive invalid, that communications metadata “taken as a whole may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained” (*Digital Rights Ireland Ltd C-293/12 v Minister for Communications et al Ireland*, 8 April 2014, Directive 2006/24/EC). This judgement is significant in relation to the role of metadata in identifying confidential sources and the threat posed by data retention to source protection.

- *May 2014 Stichting Ostade Blade v The Netherlands in the ECtHR (Application no. 8406/06)*

In this case, the Court rejected a Dutch magazine’s application against a police raid under Article 10 of the European Convention on Human Rights. This judgement demonstrates the narrow circumstances in which source protection laws can be legitimately over-ridden in the public interest.

The police raid has been conducted with a Court-approved warrant for the purpose of obtaining a letter published by the magazine which claimed responsibility for a bomb attack. The Court acknowledged that the magazine’s right to “receive and impart information” had been interfered with through the order to hand over the original letter and the subsequent raid when the magazine refused to comply with that order. However, the Court held that the author of the letter was not a “journalistic source,” stating that not “every individual who is used by a journalist for information is a ‘source’”. So, in this case, protection was found to extend only to the journalist.

On the question of necessity, the Court noted that the letter was sought as a possible lead towards identifying those suspected of having carried out bomb attacks. Nevertheless, the Court reiterated the importance of the press as “public watchdog” and the importance of ensuring that individuals remain free to disclose to the press information that should properly be accessible to the public.

The question of the source’s motive was also at issue in this case. The magazine’s informant was not motivated by the desire to provide information which the public were entitled to know, in the view of the Court. According to the judgement: “his purpose in seeking publicity through the magazine *Ravage* was to don the veil of anonymity with a view to evading his own criminal accountability.”

b. Council of Europe (COE) Resolutions, Declarations, Statements, Comments, Recommendations, Report and Guidelines

- *September 2007: Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis adopted*

These guidelines (CoE 2007) recommended that Member States adopt Recommendation No. R (2000)7 (CoE 2000) into law and practice. In March 2000, the Council of Europe’s Committee of Ministers had adopted that Recommendation on the “right of journalists not to disclose their sources of information”. The following principles were appended to Recommendation No. R(2000)7:

- *Principle 1 (Right of non-disclosure of journalists)*

Domestic law and practice in Member States should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) and the principles established herein, which are to be considered as minimum standards for the respect of this right.

- *Principle 2 (Right of non-disclosure of other persons)*

Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

- *Principle 3 (Limits to the right of non-disclosure)*

- a. *The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.*
- b. *The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:*
 - i. *reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and*
 - ii. *the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:*
 - *an overriding requirement of the need for disclosure is proved,*
 - *the circumstances are of a sufficiently vital and serious nature,*
 - *the necessity of the disclosure is identified as responding to a pressing social need, and*
 - *member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.*
- c. *The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.*

- *Principle 4 (Alternative evidence to journalists' sources)*

In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.

- *Principle 5 (Conditions concerning disclosures)*
 - a. *The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.*
 - b. *Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested.*
 - c. *Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention.*
 - d. *Journalists should have the right to have the imposition of a sanction for not disclosing their information identifying a source reviewed by another judicial authority.*
 - e. *Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.*
- *Principle 6 (Interception of communication, surveillance and judicial search and seizure)*
 - a. *The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:*
 - i. *interception orders or actions concerning communication or correspondence of journalists or their employers,*
 - ii. *surveillance orders or actions concerning journalists, their contacts or their employers, or*
 - iii. *search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.*
 - b. *Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.*
- *Principle 7 (Protection against self-incrimination)*

The principles established herein shall not in any way limit national laws on the protection against self-incrimination in criminal proceedings, and journalists should, as far as such laws apply, enjoy such protection with regard to the disclosure of information identifying a source.

A question of particular relevance to this study is how such principles might extend to online conduct. The definitions attached to Recommendation (2000)7 include the following detail which addresses this question:

- c. *the term “information identifying a source” means, as far as this is likely to lead to the identification of a source:*
 - i. *the name and personal data as well as voice and image of a source,*
 - ii. *the factual circumstances of acquiring information from a source by a journalist,*
 - iii. *the unpublished content of the information provided by a source to a journalist, and*
 - iv. *personal data of journalists and their employers related to their professional work.*

In regards to the definition of a journalist, the Recommendation states that the laws should protect “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”.

The CoE’s 2007 guidelines that reference Recommendation R(2000)7 further recommended that:

With a view, inter alia, to ensuring their safety, media professionals should not be required by law-enforcement agencies to hand over information or material (for example, notes, photographs, audio and video recordings) gathered in the context of covering crisis situations nor should such material be liable to seizure for use in legal proceedings.

- **2010: Report on the protection of journalists’ sources from the Council of Europe (CoE) Parliamentary Assembly**

This Report pointed directly to the core issues examined in this study. It stated:

“The protection of journalists’ sources of information is a basic condition for both the full exercise of journalistic work and the right of the public to be informed on matters of public concern. In a large number of cases, public authorities have forced, or attempted to force, journalists to disclose their sources, despite the clear standards set by the European Court of Human Rights and the Committee of Ministers of the Council of Europe.”

The Report also highlighted the need to limit exceptions to legal source protection provisions. “The disclosure of information identifying a source should therefore be limited to exceptional circumstances where vital public or individual interests are at stake and can be convincingly established”. It referenced the emergence of threats to journalistic source protection in the digital age: “The confidentiality of journalists’ sources must not be compromised by the increasing technological possibilities for public authorities to control the use by journalists of mobile telecommunication and Internet media”.

Further, it recommended that: “Member states which have not passed legislation specifying the right of journalists not to disclose their sources of information should pass such legislation in accordance with the case-law of the European Court of Human Rights and the Committee of Ministers’ recommendations”.

- **2011: Council of Europe Human Rights Commission issues discussion paper on Protection of Journalists from Violence (CoE HRC 2011)**

This Report by the CoE Commissioner for Human Rights directly linked journalistic source protection to journalists’ safety. “Practical guarantees of nondisclosure of confidential

sources of journalists are also a tool to avoid unnecessary risks of the profession" (CoE HRC 2011).

It also referenced a 1996 European Court of Human Rights judgement [*Goodwin v. the United Kingdom* (27 March 1996)] that "[p]rotection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected". The Court concluded in that case that, in the absence of "an overriding requirement in the public interest", an order to disclose sources would "violate the guarantee of free expression enshrined in Article 10 of the European Convention on Human Rights (ECHR)".

It was this case that led the Council of Europe's Committee of Ministers to adopt Recommendation No. R (2000)7 (See earlier discussion in this section) on the right of journalists not to disclose their sources of information. The CoE discussion paper reaffirmed that the basic protections of confidentiality of journalists' sources were not undercut by security efforts, recalling a declaration (2005) that member states should not undermine protection of sources in the name of fighting terrorism, and noting that "the fight against terrorism does not allow the authorities to circumvent this right by going beyond what is permitted [Article 10 of the ECHR and Recommendation R (2000) 7]" (See explanation of Recommendation R (2000)7 above).

- **2011: Council of Europe Parliamentary Assembly adopted Recommendation 1950 on the protection of journalists' sources. (CoE 2011)**

This Recommendation reaffirmed the centrality of source protection to democratic journalistic function:

Recalling Committee of Ministers Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information, the Assembly reaffirms that the protection of journalists' sources of information is a basic condition for both the full exercise of journalistic work and the right of the public to be informed on matters of public concern, as expressed by the European Court of Human Rights in its case law under Article 10 of the Convention.

It also acknowledged the existence of violations of the principles of source protection in Europe. Specifically, this 2011 recommendation noted broad exceptions to source protection in Hungary and called on the Government to amend the law which it described as being:

... overly broad and thus may have a severe chilling effect on media freedom. This law sets forth neither the procedural conditions concerning disclosures, nor guarantees for journalists requested to disclose their sources.

Additionally, this Recommendation required that exceptions to source protection laws be narrowly designed to prevent widespread demands from authorities for source revelation:

Public authorities must not demand the disclosure of information identifying a source unless the requirements of Article 10, paragraph 2, of the Convention are met and unless it can be convincingly established that reasonable alternative measures to disclosure do not exist, or have been exhausted, the legitimate interest in the disclosure clearly outweighs the public

interest in the non-disclosure, and an overriding requirement of the need for disclosure is proved.

The legitimate interest referred to above is specified in Article 10 (freedom of expression) paragraph 2 of the European Convention on Human Rights [1953 1. Assembly debate on 25 January 2011 (4th Sitting) see Doc. 12443, report of the Committee on Culture, Science and Education). Text adopted by the Assembly on 25 January 2011 (4th Sitting)]. This invokes national security rather broadly, which is seen by some observers to undercut legal frameworks for source protection globally. However, the CoE Recommendation does nevertheless did add stronger limits to any exceptions to source confidentiality protection to correspond to:

... exceptional circumstances where vital public or individual interests are at stake and can be convincingly established. The competent authorities, requesting exceptionally the disclosure of a source, must specify the reasons why such vital interest outweighs the interest in the non-disclosure and whether alternative measures have been exhausted, such as other evidence. If sources are protected against any disclosure under national law, their disclosure must not be requested.

The Recommendation also pointed to the importance of confidential sources within the police and judiciary, and the right of journalists not to disclose them. "Where such provision of information to journalists was illegal, police and judicial authorities must pursue internal investigations instead of asking journalists to disclose their sources". The problem of data retention in connection with source protection is also referenced in the Recommendation:

Referring to the European Union's Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, the Assembly insists on the need to ensure that legal provisions enacted by member states when transposing this directive are consistent with the right of journalists not to disclose their sources under Article 10 of the Convention and with the right to privacy under Article 8 of the Convention.

Importantly, the Recommendation highlights the importance of applying the principles of confidential information sharing to third party intermediaries:

In so far as Article 10 of the Convention protects the right of the public to be informed on matters of public concern, anyone who has knowledge or information about such matters should be able to either post it confidentially on third-party media, including Internet networks, or submit it confidentially to journalists.

This is relevant to the emerging threat of pressure applied to third party intermediaries to hand over data to authorities or litigants, thereby circumventing source protection laws.

According to the Recommendation:

The Assembly reaffirms that the confidentiality of journalists' sources must not be compromised by the increasing technological possibilities for public authorities to control the use by journalists of mobile telecommunication and Internet media. The interception of correspondence, surveillance of journalists or search and seizure of information must not circumvent the protection of journalists' sources. Internet service providers and telecommunication companies should not be obliged to disclose information which may lead to the identification of journalists' sources in violation of Article 10 of the Convention.

The Recommendation also indicated the need to extend source protections to non-traditional media platforms in line with changes in professional practice, publishing and distribution modes, the role of social media, and participatory audiences and sources:

In the same manner as the media landscape has changed through technological convergence, the professional profile of journalists has changed over the last decade. Modern media rely increasingly on mobile and Internet-based communication services. They use information and images originating from non-journalists to a larger extent. Non-journalists also publish their own or third-party information and images on their own or third-party Internet media, accessible to a wide and often undefined audience. Under these circumstances, it is necessary to clarify the application of the right of journalists not to disclose their sources of information.

Nevertheless, the Recommendation took the position that bloggers and social media actors are not journalists and therefore should not be able to claim access to source protection laws:

The right of journalists not to disclose their sources of information is a professional privilege, intended to encourage sources to provide journalists with important information which they would not give without a commitment to confidentiality. The same relationship of trust does not exist with regard to non-journalists, such as individuals with their own website or web blog. Therefore, non-journalists cannot benefit from the right of journalists not to reveal their sources.

This conflation of 'journalism' with 'journalists' could, in effect, exclude a significant number of important journalistic actors – such as academic or legal bloggers, activists with human rights organisations who use social media as platforms to share information imparted confidentially in the public interest, journalism educators and their students.

On a different issue, the synergies between whistleblower protections and legal frameworks designed to protect journalists from being compelled to reveal their sources were also recognised in the Recommendation:

With regard to the right of every person to disclose confidentially to the media, or by other means, information about unlawful acts and other wrongdoings of public concern, the Assembly recalls its Resolution 1729 (2010) and Recommendation 1916 (2010) on the protection of "whistle-blowers" and reaffirms that member states should review legislation in this respect to ensure consistency of domestic rules with the European standards enshrined in these texts.

Finally, the Assembly recommended that the Committee of Ministers call on all their Member States to:

- Legislate for source protection
- Review their national laws on surveillance, anti-terrorism, data retention, and access to telecommunications records
- Co-operate with journalists' and media freedom organisations to produce guidelines for prosecutors and police officers and training materials for judges on the right of journalists not to disclose their sources

- Develop guidelines for public authorities and private service providers concerning the protection of the confidentiality of journalists' sources in the context of the interception or disclosure of computer data and traffic data of computer network
- **2014 Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors adopted:**

This Declaration stated:

A favourable environment for public debate requires States to refrain from judicial intimidation by restricting the right of individuals to disclose information of public interest through arbitrary or disproportionate application of the law, in particular the criminal law provisions relating to defamation, national security or terrorism. The arbitrary use of laws creates a chilling effect on the exercise of the right to impart information and ideas, and leads to self-censorship.

Furthermore, it declared that "...prompt and free access to information as the general rule and strong protection of journalists' sources are essential for the proper exercise of journalism, in particular in respect of investigative journalism".

The Committee of Ministers also directly addressed the implications of mass surveillance for source protection: "Surveillance of journalists and other media actors, and the tracking of their online activities, can endanger the legitimate exercise of freedom of expression if carried out without the necessary safeguards, and it can even threaten the safety of the persons concerned. It can also undermine the protection of journalists' sources".

The Committee also agreed to consider further measures regarding the alignment of laws and practices concerning defamation, anti-terrorism and protection of journalists' sources with the European Convention on Human Rights.

- **January 2015: Council of Europe Committee on Legal Affairs and Human Rights, Report on Mass Surveillance/Resolution and recommendation**

This Report, prepared by Rapporteur Pieter Omtzigt, on the impact of mass surveillance on human rights, addressed the implications for journalistic source protection in the context of freedom of expression and access to information. He stated:

When authors, journalists or civil society activists are reluctant to write, speak, or pursue research about certain subjects (e.g. the Middle East, criticisms of the government post-9/11, the Occupy movement, military affairs, etc.), or to communicate with sources or friends abroad for fear that they will endanger their counterparts by so doing, this does not only affect their freedom of speech, but also everyone else's freedom of information. (COE, Omtzigt 2015 p25)

The Report also connected the detainment of *Guardian* journalist Glen Greenwald's partner to the impact of surveillance. Greenwald was Snowden's original confidante and court documents reveal that both Greenwald and his partner were under surveillance due to suspicion that they were transporting data associated with Snowden's files. According to the Report, the Brazilian citizen had his mobile phone, laptop, DVDs and other items seized.

- **January 2015: CoE Resolution and Recommendation on mass surveillance**

The Council of Europe Committee on Legal Affairs and Human Rights unanimously adopted a Resolution, and a Recommendation, based on the Report discussed above, on January 26th 2015. The Resolution included the following statements:

The Parliamentary Assembly is deeply concerned about mass surveillance practices disclosed since June 2013 by journalists to whom a former US national security insider, Mr. Edward Snowden, had entrusted a large amount of top secret data establishing the existence of mass surveillance and large-scale intrusion practices hitherto unknown to the general public and even to most political decision-makers.

In the context of this concern, the Resolution makes the following additional points:

- *The surveillance practices disclosed so far endanger fundamental human rights, including the rights to privacy (Article 8 European Convention on Human Rights (ECHR)), freedom of information and expression. These rights are cornerstones of democracy. Their infringement without adequate judicial control also jeopardizes the rule of law.*
- *It is also worried by the collection of massive amounts of personal data by private businesses and the risk that these data may be accessed and used for unlawful purposes by state or non-state actors.*
- *The Assembly is also deeply worried by the extensive use of secret laws, secret courts and secret interpretations of such laws, which are very poorly scrutinized.*

Relevantly, the associated Recommendation proposed by the Committee invited the CoE Council of Ministers to consider:

- *Addressing a recommendation to Member States on ensuring the protection of privacy in the digital age and internet safety in the light of the threats posed by the newly disclosed mass surveillance techniques*

c. Council of the European Union Resolutions, Declarations, Reports and Guidelines

- ***May 2014: Council of the European Union - "EU Human Rights Guidelines on Freedom of Expression: Online and Offline"***

These guidelines included the following pertinent statements:

States should protect by law the right of journalists not to disclose their sources in order to ensure that journalists can report on matters in the public interest without their sources fearing retribution. All governments must allow journalists to work in a free and enabling environment in safety and security, without the fear of censorship or restraint.

The EU will "support the adoption of legislation that provides adequate protection for whistle-blowers and support reforms to give legal protection to journalists' right of non-disclosure of sources".

5.2 The Americas

Regarding Latin America, Banisar (2007) wrote:

There are also important declarations from the Organisation of American States (OAS). Few journalists are ever required to testify on the identity of their sources. However direct demands for sources still occur regularly in many countries, requiring journalists to seek legal recourse in courts. There are also problems with searches of newsrooms and journalists' homes, surveillance and the use of national security laws. (Banisar, 2007: 81)

In 1997, the Hemisphere Conference on Free Speech staged in Mexico City adopted the Chapultepec Declaration. Principle 3 states:

No journalist may be forced to reveal his or her sources of information. (Chapultepec Declaration 1997)

Building on the Chapultepec Declaration, in 2000 the Inter-American Commission on Human Rights (IACHR) approved the Declaration of Principles on Freedom of Expression as a guidance document for interpreting Article 13 of the Inter American Convention of Human Rights. Article 8 of the Declaration states:

Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential. (Organisation of American States 2000)

The application of the term 'social communicator' has resonance with the 'who is a journalist?' debate in reference to shield laws. There are noteworthy developments with regards to the status of the above regional instruments since 2007:

- **Guatemala 2013:** (The then) President Otto Pérez Molina expressed interest in signing the Declaration of Chapultepec, however he later suspended the signing.
- **Venezuela 2013:** announced its withdrawal from the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights.

In 2013, the Inter American Commission on Human Rights report *Violence Against Journalists and Media Workers: Inter American Standards and National Practices on Prevention, Protection and Prosecution of Perpetrators* by the Office of the Special Rapporteur for Freedom of Expression provided the following definition of journalists relevant to debates about source protection entitlement:

...journalists are those individuals who observe and describe events, document and analyse events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering facts and analyses to inform sectors of society or society as a whole. Such a definition of journalists includes all media workers and support staff, as well as community media workers and so-called "citizen journalists" when they momentarily play this role. Such definition also includes persons who might be using new communications media as a tool to reach the public, as well as opinion makers who are targeted for the exercise of their right to freedom of expression. (Botero 2013 p2)

5.3. Africa

Article 9 of the African Charter of Human Rights gives every person the right to receive information and express and disseminate opinions (Banisar, 2007:20). The 2002 Declaration of Principles on Freedom of Expression in Africa, released by the African Commission on Human and People's Rights, provided guidelines for member states of the AU on protection of sources:

XV Protection of Sources and other journalistic material

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- *The identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;*
- *The information or similar information leading to the same result cannot be obtained elsewhere;*
- *The public interest in disclosure outweighs the harm to freedom of expression;*
- *And disclosure has been ordered by a court, after a full hearing.*

Noteworthy developments since 2007:

- **April 2013 - Model Law** on Access to Information in Africa by the Special Rapporteur on Freedom of Expression and Access to Information at the African Commission on Human and People's Rights was circulated.

An information officer may refuse a request if the information: "(c) Consists of confidential communication between a journalist and her or his source".

- **May 2015 - East African Court of Justice (EAJC) judgement on Burundi Press Law** (Burundian journalists' union v the Attorney General of the Republic of Burundi, Reference No.7 of 2013)

In this judgement, the EAJC ruled Articles 19 & 20 of Burundi's 2013 Press Law violated democratic principles and should be repealed.

Article 20 of the 2013 Press law obligates journalists to "reveal their sources of information before the competent authorities in situations where the information relates to State security, public order, defence secrets and the moral and physical integrity of one or more persons". However, the judges upheld the challenge originally brought by the Burundi Journalists Union, referring to the need for proportionality and necessity with regard to exceptions to source protection – even in cases of national security. They cited the Goodwin vs. UK judgment which states:

Protection of journalistic sources is one of the basic conditions for press freedom Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected".

The judges in the Burundi case explained their position thus:

...because whereas the four issues named are important in any democratic state, the way of dealing with State secrets is by enacting other laws to deal with the issue and not by forcing journalists to disclose their confidential sources... . As for the issue of moral and physical integrity of any person, the obligation to disclose a source is unreasonable and privacy laws elsewhere can be used to deal with the matter. There are in any event other less restrictive ways of dealing with these issues.

They concluded: “We have no hesitation in holding that Article 20 does not meet the expectations of democracy and is in violation of Articles 6(d) and 7(2) of the Treaty”

5.4 Asia and the Pacific

The Association of Southeast Asian Nations (ASEAN) adopted a Human Rights Declaration in November 2012 with general provisions for freedom of expression and privacy (ASEAN 2012). Reservations have, however, been voiced regarding the wording of provisions on human rights and fundamental freedoms in relation to political, economic and cultural systems and the Declaration’s provisions on “balancing” rights with individual duties as well as an absence of reference that legitimate restrictions of rights must be provided by law and conform to strict tests of necessity and proportionality (UN 2012; OHCHR (UN) 2012a; OHCHR (UN) 2012b).

5.5. Inter-regional institutions

a. Organisation for Security and Co-operation in Europe (OSCE)

The OSCE Representative on Freedom of the Media (RFOM) regularly issues statements and comments regarding breaches and threats to legal source protection frameworks. Several of these statements are referenced in the Regional Overviews section below, in the context of specific incidents. Additionally, the following recommendations are relevant:

- *June 2011 Organisation for Security and Cooperation in Europe (OSCE) – Representative on Freedom of the Media: Vilnius Recommendations on Safety of Journalists (OSCE 2011)*

This set of recommendations included the following point relevant to source protection in connection with journalism safety: “Encourage legislators to increase safe working conditions for journalists by creating legislation that fosters media freedoms, including guarantees of free access to information, protection of confidential sources, and decriminalising journalistic activities.”

b. The Organisation for Economic Co-operation and Development (OECD)

- *April 2013 draft report published: “CleanGovBiz Integrity in Practice, Investigative Media” (OECD 2013)*

This Report asked the questions: “Are journalists guaranteed to keep their information sources private? If so, how is this ensured?” It acknowledged that: “It can be dangerous for members of the public to provide journalists with information, especially if that information denounces serious misbehaviour or pertains to corruption. That is why people often only agree to speak up anonymously. The journalists can then use the information but will not make the name of this source public.”

The Report argued that forcing a journalist to reveal a source in such cases would be a short sighted approach in many cases: “...once a corruption case has been brought to light by a journalist, law enforcement has an incentive to discover the anonymous source(s). While

the source might indeed be valuable for the case in question either by providing additional information or through being a witness in court forcing the journalist to reveal the source would often be short-sighted.”

The Report, which also cited the CoE Committee of Ministers’ Recommendation R(2000)7, pointed out the broader risks of unmasking journalists’ confidential sources:

With chances being high that anonymity might be lifted, less people will risk disclosing information to journalists in the future. Revealing sources limits the ability of people to impart information and reduces the ability of the public to receive information, both of which are rights granted by Article 19 the Universal Declaration of Human Rights. Journalistic sources should therefore be protected by law.

Further, the Report stipulated that such protection “should not only include the journalists’ contact persons but also their own workspace and research”. And it argued that: “Exceptions should only be granted by a judge and only for key witnesses and serious crimes,” highlighting the importance of clearly specifying restrictions, “so that journalists can reliably inform their potential sources about the risks involved”.

5.6. Regional Instruments of Human Rights Law - conclusion

Significant progress has been made in the European regional context with regards to addressing the emerging threats to legal source protection environments in the digital era. In Latin America and Africa, there is some recognition of the extent of gaps in addressing legislative and normative environments regarding source protection in digital contexts.

6. Overviews by UNESCO Region

Ultimately, developments with actual or potential relevance to legal and regulatory environments regarding protections for journalists' sources were recorded in 84 out of the 121 countries (69%) studied for this report, during the period 2007-2015. These developments were identified through a process of studying 121 UNESCO member States in accordance with the methodology outlined earlier in this Study. They have been analysed with a particular emphasis on digital dimensions and the key identified themes of:

- a. The overriding or 'trumping effect' of National Security/Anti-terrorism legislation
- b. The potential of surveillance (mass and targeted) in undercutting legal protections
- c. The potential of third party intermediaries and data retention
- d. Changes affecting entitlement to protection – Who is a journalist?/What is journalism?
- e. Other digital dimensions (e.g. risk of confiscation of electronic equipment which may include confidential source information)
- f. Anonymity issues
- g. Other dimensions

This study has not conducted an in-depth assessment of national security/anti-terrorism laws in every case. Therefore, it should not be inferred that every such law automatically translates into a threat to source protection. The problem arises when such laws may expressly override legal source protection frameworks or are used to justify access to journalistic communications where such access is not independently assessed as to whether it is 'necessary or proportionate', and where definitions of national security are overly broad and can allow for abuse.

This study further does not presume that all changes affecting surveillance, data retention and third parties necessarily impact on the confidentiality of journalistic sources, but that these may have significance for strengthening or weakening such confidentiality. Likewise, with the legal definitions of journalists and journalism. Therefore, the references below to any developments in these areas are primarily to draw attention to issues that in principle can have a bearing on confidentiality. Accordingly, States and other actors seeking to protect such confidentiality are alerted to the range of issues within the ecosystem of journalism and its sources.

It is also necessary to note that factors such as confiscation of digital devices and issues of anonymity in a society are signalled below on the same basis, i.e. without prejudging the specific cases mentioned. Instead, there are examples of developments uncovered by this research that point to the kind of changes that may be of direct or indirect relevance to source protection. The research does not go into issues of the legality of confiscation of journalists' equipment in any instance listed below, but rather signals these instances on the basis that any confiscation per se may have implications for digital confidentiality issues concerning journalists' sources.

Further research into each country studied is recommended in order to assess the full impact of all issues pertaining to source protection in each case. Under the constraints of time and budget, it was not possible to evaluate the extent to which any change registered

was indeed of relevance to source protection. The reported information is therefore not necessarily representative of trends in any society.

Overall, the information below does not purport to assess whether a particular given development was positive, negative or ambiguous for source confidentiality protection, whether in practice or in potential. Nevertheless, the information provided is a pointer to the range of intersecting developments within UNESCO regions, which developments have bearing for source protection issues in the digital age. The data is thus indicative of potential issues, and does not make any claim to be a comprehensive assessment.

The countries studied in this report have been divided into UNESCO regional groups, as follows:

- i. Africa
- ii. Arab States
- iii. Asia and the Pacific
- iv. Europe and North America
- v. Latin America and The Caribbean.

6.1. Africa

"In Africa, there exists a relatively strong recognition of the right of journalists to protect their sources, at national, sub-regional as well as continental levels. However, and by and large, this recognition has not yet resulted in a critical mass of legal provisions" (Banisar, 2007: 53).

This study has identified relevant developments with direct or potential relevance to source protection trends between 2007-2015 in 18 out of 32 countries¹¹ (56%) that have been examined in the Africa region.

African countries where developments have been noted since 2007:

- Angola
- Botswana
- Burundi
- Cameroon
- Côte d'Ivoire
- Ethiopia
- Gambia
- Kenya
- Lesotho

¹¹ South Sudan is excluded from this study on methodological grounds. But it is recommended for inclusion in future research

- Mauritius
- Niger
- Nigeria
- Rwanda
- Sierra Leone
- Somalia
- South Africa
- Uganda
- Zimbabwe

In 2007, Banisar identified the source protection issues in Africa as follows:

In the lion's share of African countries, there is no legal protection of sources whatsoever. In many of the countries that fall under this category, journalists have been subject to criminal and civil sanctions, harassment and torture to force them to reveal their sources. In a few cases, courts have ruled in favour of journalists [who are] being prosecuted by governments for refusing to name sources. Yet this jurisprudence, however positive, has not necessarily led to protection laws being put in place. ...Overall, even where national protections are strong on paper, the tendency in practice is for these laws to be flouted – often by security and intelligence services who intimidate journalists through raiding of newsrooms and surveillance. (Banisar 2007: 53)

In 2015, source protection laws in Africa remain limited. The data collected for this study show that legal developments affecting source confidentiality and its protection in Africa over the past eight years were largely non-digital. As elaborated below, since 2007, Kenya and Niger have introduced a form of legal protection for journalists' sources, while there is a new constitution that affects source protection in Angola. However, in several States, legal source protection frameworks can be seen to have been potentially at risk of erosion by moves to provide broad exclusions to a journalist's right to protect their sources from disclosure on 'national security' grounds, and the criminalisation of breaches. Meanwhile, allegations of mass surveillance emerged as a notable theme in some countries.

a. National security/Anti-terrorism impacts

The themes of national security and mass surveillance are surfacing across Africa. ARTICLE 19's East Africa representative Henry Maina told this Study's researchers there have been cases in multiple countries where journalists have been compelled to disclose their sources in cases linked to terrorism charges (Maina 2015).

In South Africa, the Protection of State Information bill was passed in 2013 after much debate about the definition of national security and whether there should be limited public interest exception (which could apply to cases of source confidentiality). At the time of writing, the bill had not been signed into law by the President (Freedom House (j) 2014; RDM Newswire 2015; PMG).

In Burundi, security-based exceptions to legal protections for journalists' sources (enshrined in a 2003 Press Act) were introduced during the period. A new Press Law promulgated in June 2013 guaranteed journalistic source protection (Burundi Press Law 2013, Article 16). At the same time, this is also restricted under Article 20 of the legislation, which allowed broad exemptions. Article 20 stated that media are required to provide, before the competent courts, the information revealing the source in one of the four following cases:

1. Information concerning state security offenses;
2. Information concerning offenses relating to public order;
3. Information concerning offenses relating to defence secrets;
4. Information concerning offenses relating to the physical and moral integrity of a person or persons

Under the Act, the National Communications Council (NCC) had the authority to issue warnings to journalists who failed to comply, and three NCC warnings could lead to suspension or deregistration. However, there were two significant developments regarding this law. In March 2015, the National Assembly repealed elements of the act, including the exceptions to source protection guarantees (Rhodes 2015). The Burundi Senate was considering these amendments at the time of writing. Secondly, the East African Court of Justice (see also regional instruments section above) ruled that sections of the 2013 Press Law (including Article 20, which stipulated exceptions to the journalists' privilege) contravened principles of democracy and accountability in the constitution of the East African Community (Burundian journalists' union v the Attorney General of the Republic of Burundi, Reference No.7 of 2013). At the time of writing it was not possible to establish how the Burundi Government had responded to the judgement.

In Kenya, after a terrorist attack in 2013, journalists were asked to reveal the source of leaked CCTV footage which appeared to show looting soldiers. The request was later withdrawn and an investigation into the soldiers' behaviour led to the sacking and imprisonment of those found guilty of looting (ARTICLE 19 2013a; Zadock, A 2013; Saul, H 2013; BBC 2013b).

In Cameroon, two journalists (working for two separate newspapers) were barred by a military tribunal from practicing journalism, and banned from leaving the country on national security grounds in 2014, after they refused to hand over reporting materials from a confidential source. Further hearings were pending at the time of writing and the National Communications Council (NCC) was investigating the actions (Ezieh 2014).

b. Mass surveillance and targeted surveillance

Between 2009 and 2014, three African countries introduced laws authorising surveillance, without exemptions for journalistic communications. (The Security Laws (amendment) Act 2014, Kenya; The Information and Communications Act Section 209, 138, Gambia; Anti-terrorism Proclamation No.652/2009, Ethiopia).

In Uganda, following a terrorist attack in the capital Kampala in 2010, *The Regulation of Interception of Communications Act 2010* was passed by the Ugandan Government to reinforce the provisions in the *Anti-Terrorism Act No.14 of 2002* legislation. The two pieces of legislation operate in tandem, allowing the authorities to intercept and monitor letters, packages, bank details, calls, faxes, emails and other communications, as well as monitoring

meetings of any groups of persons following consent from a high court judge (s19 Anti-Terrorism Act No. 14 2002; CIPESA 2014). Under Section 5, subsection (1)(c)(d)&(e) a magistrate will grant a warrant for a lawful intercept if there is a terrorist threat (Uganda, 2002; CIPESA 2014).

Spyware attacks in 2014 and 2015 on the US-based Ethiopian Satellite Television Service (ESAT), were reported by the Citizen Lab at Canada's Munk School of Global Affairs at the University of Toronto, potentially putting source confidentiality at risk (Marczak et al 2015; CPJ 2015c). Reports on monitoring of the cell phones of two South African journalists surfaced between 2010 and 2014 (Duncan 2014; IOL 2015; Right to Know 2014).

c. Data retention and third party intermediaries

This is an issue receiving attention in Uganda, where in December 2014, the National Information Technology Authority of Uganda, together with the Ministry of Information and Communications Technology and the Ministry of Justice and Constitutional Affairs, released the draft of a Data Protection and Privacy Bill for public consultation (Draft of 20th August 2014, The Data Protection and Privacy Bill of 2014). The proposed law aimed to safeguard the rights of individuals whose data is collected by government and both public and private institutions (NITA 2014; OpenNet Africa 2015; Monitor 2015). The bill stipulated that personal data may only be collected and processed with the prior consent of the data's subject, unless an exemption is satisfied, such as for the purposes of national security (FADV 2014). The bill would impose notification requirements of the data's subject, which required the individual to be notified prior to data collection, including the nature of the data, the purpose for which the data is required, right to access data, right to rectify the data and whether the data required is discretionary or mandatory (section 9(1) (CIPESA 2014). It would also impose penalties on 'data controllers' who knowingly or recklessly obtain or disclose personal data (FADV 2014).

Additionally, s79 of the Ugandan Communications Commission Act 2013 stated that any operator of a communications service or system who 'unlawfully intercepts any communication' between persons using that service is liable to imprisonment or a fine (UCC 2013). These propositions for transparency and accountability measures regarding data collection and handover could aid journalists in their efforts to protect their sources. At the same time, Section 4(2) of the legislation, which states that personal data may be collected or processed where the collection or processing is necessary for 'national security' is broad and could be open to misinterpretation.

In Niger, the 2005 Computer Security and Critical Information Infrastructure Protection Bill mentioned in Banisar (2007: 63), which mandated ISPs to provide data to law enforcement agencies, failed to pass in 2011 (This Day Live, 2011).

The Angolan government introduced a cybercrime bill in 2011 that would have expanded the authorities' ability to seize citizens' personal data, without exceptions that could be relevant to journalistic communications. The bill won initial approval in the parliament but the Government later withdrew it.

d. Entitlement to protection: Who is a journalist/What is journalism?

The 2013 Press Law in Burundi introduced new professional requirements for journalists, including: holding a Bachelor of Journalism, or any bachelors degree accompanied by completion of a training course or two years practical journalism experience. They are also required to have journalism as a “regular and paid principal activity” and to exercise the profession in “one or more newspaper companies” (Burundi Press Law 2013) This definition of a professional journalist could limit the range of journalistic actors claiming source protection.

In Uganda, new source protection provisions introduced under Section 38 of the amended *Press and Journalists Act* (2010) (See discussion above) required a journalist to be registered in order to enjoy source protection. In Somalia, a draft media bill required defining the term ‘journalist’ to include Somali nationality, journalism knowledge, and three years experience in the media industry (Article 24, draft media bill, NUSOJ, 2014). The Code of Conduct for the Practice of Journalism in Kenya’s Media Council Act 2013 is restricted to: “a journalist, media practitioner, foreign journalist or media enterprise”.

e. Other digital dimensions

There have been a number of reported incidents of journalists’ devices being taken, something that as noted earlier, may have the potential for exposure of confidential sources. For example, in Uganda, a journalist’s laptop and mobile phone were confiscated during an investigation (CIPEA 2014). In Angola, computers at a newspaper were confiscated in 2012 (CPJ 2012b; Freedom House 2013c). In Botswana, in 2014 the editor of *Sunday Standard* had his computer taken by police (ENCA 2014; CPJ 2014b; Mail & Guardian 2014). The examples here, like those below, are not provided with the presumption that confidential data was unduly exposed in these cases but that such exposure was a risk.

f. Anonymity issues

None were recorded in this region by the researchers during the period under study.

g. Other dimensions

In Zimbabwe, a new Constitution adopted in 2013 contains specific provisions for the protection and confidentiality of journalists’ sources. Section 61.2 of the Constitution states that “Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists’ sources of information” (The Constitution of Zimbabwe Amendment (No. 20) Act 2003). Calls have also been made to align media and access to information laws, provisions for the interception and monitoring of communications contained in the 2007 Interception of Communications Act, and provisions for criminal defamation contained in the Criminal Law (Codification and Reform Act) with the new Constitution (New Zimbabwe 2013).

In South Africa, there have been calls to amend apartheid-era legislation such as Section 205 of the Criminal Procedure Act, under which journalists have been subpoenaed to reveal their sources. In 2010, two journalists were prosecuted under this law to reveal the identities of sources (Dibetle 2010). The case was adjourned to enable mediation between

the TV network, the South African National Editors Forum (SANEF) and the police (Malumo 2010). SANEF argued that authorities in the case had not followed a Memorandum of Understanding (MOU) brokered by the body in 1999, which outlined a process to follow in the event of authorities seeking confidential source information from journalists (SANEF 2010a. See also SANEF 2010b). One of the journalists subpoenaed told this study's researchers that they were ultimately able to protect the identity of their sources and that the MOU is still in place (Said 2015).

While South Africa has not introduced explicit protection for journalists' sources, partly in response to journalists' concerns about the risk of legislating obligations, a landmark ruling in 2012 (*Bosasa Operation (Pty) Ltd v Basson and Another 09/29700*) protected the confidentiality of sources relied on in a *Mail and Guardian* article (Global Journalist 2012.) The South African Constitutional Court refused to hear an appeal against the judgement in 2013, so the ruling stands (Holmes 2013, SANEF 2012).

In May 2013, police received a warrant to search Ugandan newspapers *The Daily Monitor* and *The Red Pepper* in regard to the source of a leaked letter underpinning a story (HRW 2013b; BBC 2013a; CPJ 2013). Also in Uganda, *The Press and Journalist Act* was amended in 2010 and now protects a journalist from revealing the identity of their confidential sources, unless s/he has the consent of the person who gave him/her the information, or on an order of a court law (IFEX 2010).

In Burundi in 2014, two journalists from two independent radio stations were asked to reveal their sources in terms of a summons under the 2013 Media Law. The Law contains provisions for disclosure where reporting is found to jeopardize moral integrity (Rhodes 2014; Hakizimana 2014). In a separate case, in January 2015, Burundian authorities charged, and imprisoned for a period, the director of Radio Publique Africaine, in partial connection with the confidentiality of a source (CPJ 2015a; RSF 2015e; HRW 2015a).

Rwanda introduced a new media law in 2013. The law entitles courts to compel journalists to reveal their sources in any legal proceedings, and not necessarily as a last resort (ARTICLE 19 2013b).

In Kenya, there now exists qualified protection of journalists' sources. Kenya's Media Council Act 2013 (No. 46 of 2013) states that journalists shall use identifiable sources wherever possible, and provides that: "Confidential sources shall be used only when it is clearly in the public interest to gather or convey important information, or when a person providing information might be harmed" (Section 45). It further states: "Unnamed sources shall not be used unless the pursuit of the truth will best be served by not disclosing the source, who shall be known by the editor and reporter" (Odera 2014).

In Niger in 2010, a clause was added to the 1999 Press Ordinance stating that: "the professional journalist cannot be forced to divulge their source of information" (Ordinance No. 2010-035).

In Lesotho, in 2009 the Law Reform Commission was tasked by the minister of communications to review the media regulatory landscape, including the confidentiality of sources (Limpitlaw 2012). At the time of writing, no further developments had taken place.

In Mauritius, the *Media Law and Ethics in Mauritius* preliminary report (2013) by Geoffrey Robertson QC (commissioned by the Prime Minister of Mauritius) recommended a new statutory provision: "No court may require a person to disclose, nor is any person guilty of

contempt for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it is clearly established that such disclosure is essential in the interests of justice" (Government Programme 2010-2015). Additionally, it stated, "Every press code requires, as an ethical rule, that a journalist must protect his or her sources. Without such protection, many sources would not come forward to provide newsworthy information they would 'dry up', as would the supply of news" (Robertson 2013).

In Sierra Leone, when Liberia's ex-President Charles Taylor was being tried by the Special Court for Sierra Leone for crimes against humanity and war crimes, an attempt was made to get a journalist to reveal his source during the trial. However, the presiding judge dismissed the request (Simon 2009).

In Côte d'Ivoire, the Code of Ethics for Ivorian Journalists (2012) states that journalists have the right to protect their sources (Cote d'Ivoire Ministry of Communications, 2012).

In Somalia, under media laws introduced in 2007, a media house must record and keep the voice of a 'confidential source' to disclose before a court (Article 25, subsection 7).

There are no source protection laws covering journalistic actors in Nigeria, according to Toyosi Ogunseye, Editor, *The Sunday Punch*, interviewed for this study in 2014. Two journalists were detained in 2013 after refusing to reveal the source of a leaked document (Balev 2013).

Regional Conclusion

Many of the developments above, which cover a mix of potential implications for the protection of source confidentiality, have relevance to both digital and non-digital issues. However, there is not a lot of attention in the region that has been given to issues of whether to restrict or protect source confidentiality in the purely digital space – possibly in part because of the relatively low level of access to digital communications in the research period. As more users are able to regularly contribute to and access online news content, this may change. Meanwhile, over the period 2007-2015, 18 out of 32 countries examined did see various developments pertaining to source protection laws, across a number of relevant considerations set out above.

6.2. Arab States

The methodology applied to this study, based on updating the countries covered in the 2007 Privacy International report means that there has not been research on a number of Arab States that have undergone dramatic transition since 2007. However, through this study's research process, the author nevertheless noted specific developments in Tunisia¹², Jordan, Kuwait, Palestine, Iraq, Bahrain, Lebanon, and Yemen. It is recommended that additional research be undertaken in each of these countries in the future.

12 Tunisia was not mentioned in the Banisar report and so the methodology applied to this study disqualifies it from examination. But it is noteworthy that the country introduced Decree-Law 115, article 11 of which introduced protections for journalists' sources, as well as "any person involved in the preparation of news and information" (http://en.rs.f.org/IMG/pdf/120214_observations_rsf_code_de_la_presse_gb_-_neooffice_writer.pdf) There are a number of exceptions to this law: where there is an investigation by public authorities to identify sources; a request for a journalist to disclose their sources; reasons from national or state security; dangers to third parties. (ibid). A breach of article 11 by an individual is liable to a year's imprisonment and a fine of 120 dinars (article 14 ibid).

There were six countries in this region out of seven (86%) from the study data set where developments occurred between 2007-2015:

- Algeria
- Egypt
- Mauritania
- Morocco
- Sudan¹³
- Syrian Arab Republic (the)

Emerging themes in this region include the impact of national security legislation, mass surveillance, debate on what constitutes a journalist, as well as non-digital issues.

Rawda Ahmed from the Arabic Network for Human Rights commented on the situation in the Arab States to this Study's researchers: "The laws in most of the Arab countries are in favour of source protection, yet in practice the matter is different". She said that journalists are sometimes required to reveal the identity of their sources under emergency laws, or on the premise of fighting terrorism. (Ahmed 2015)

a. National Security/Anti-terrorism impacts

In the Syrian Arab Republic, a new media law was introduced in 2011 (Legislative Decree No 108, 2011 on media law) which circumscribes the media from publishing content that affects 'national security'. In Algeria, a new media law was introduced in 2012, which establishes limitations on coverage of state security (Algeria, 2012; CPJ 2012a).

b. Mass surveillance and targeted surveillance

While Internet engagement among the Arab states remains relatively low, the increasing numbers of users has corresponded with three countries introducing laws regulating use of the Internet since 2007, with potential implications for source protection.

In Egypt, litigation was pending (number 63055, judicial year 68) at time of writing against the Egyptian Ministry of Interior, challenging the Government's Internet monitoring activities. Such alleged surveillance is argued to contradict Egyptian laws regulating the investigation of evidence, which is limited to criminal activities or illicit acts (Provision 21 of Criminal Procedure Law).

In regards to Sudan, the 2009 Press and Printed Materials Act states (under the section Rights and Immunity of a Journalist that a journalist shall enjoy protection of sources (The Press and Press Printed Materials Act, 2009). At the same time, there is reported monitoring of online activities under the National Security Act of 2010 (Sudan, 2010; Freedom House 2014k; Reporters Sans Frontiers, 2014g; *Amnesty International* 2012).

c. Data retention/third party intermediaries

In Morocco, article 54 of the Draft Digital Law makes online service providers responsible for content created by users, which could indirectly impact on source confidentiality (Rhanem 2014).

d. Entitlement to Protection: Who is a journalist?/What is journalism?

Three of the countries studied demonstrated developments in relation to the question of who is entitled to claim source protection.

In October 2014, the Moroccan Government introduced a number of bills pertaining to the media. Among them was the “Status of Professional Journalists” bill that contains source protection provisions (RSF 2014c). Article 1 of the Status of Professional Journalists Bill stated that professional journalists are those “whose main occupation, regular and paid” is in “one or more publications, newspapers or periodicals published in Morocco, in one or more news agencies or in one or more broadcasting organizations, whose main office is located in Morocco” (Dahir n° 1-95-9 du 22 ramadan 1415 (22 Février 1995) portant promulgation de la loi n° 21-94 relative au statut des journalistes professionnels).

Sudan’s 2009 Press and Printed Materials Act requires journalists to enrol in the Journalists Roll with the National Council for Press and Publications (NCPP) (see Freedom house 2014k; The Press and Press Printed Materials Act, 2009). Draft amendments to the act proposed in 2013 (Abbas 2013) would allow the authority to cancel journalists’ licenses (Abubkr 2014).

In Algeria, under the new *Code de l’Information*, section 85 states that: “Professional secrecy is a right for the journalist and the director responsible, in accordance with laws and regulations” (*Code de l’Information de l’Algérie* 2012 Art. 85). The act defines a ‘journalist’ as someone whose income is solely derived from journalism.

e. Other digital dimensions

In Morocco in early 2015, recording equipment and other materials were confiscated from two French journalists (RSF 2015a). This example is not provided with the presumption that confidential journalistic data was unduly exposed.

f. Anonymity issues

In Algeria, the 1990 *Code de l’Information de l’Algérie* recognised the right of Editors-in-Chief of publications to not disclose the real name of journalists or authors who write under pseudonyms, except when demanded by a competent authority following an official complaint (Article 39). Article 86 of the new 2012 media law requires that the journalist reveal his or her identity to their director and does not specify any exceptions (2012 *Code de l’Information de l’Algérie*).

The Mauritanian government ratified a Cybercrime Bill in 2014 (Jedou 2014), which has potential to impact on source confidentiality especially as regards the banning of encryption (see *Legal framework of the Mauritanian Information Society*, 2014).

g. Other dimensions

Four countries of the six reflecting developments demonstrated shifts in relation to source protection that are also relevant to non-digital dimensions. Morocco, Algeria and Sudan have been mentioned above. In Syria, a legislative decree states that the only institution permitted to ask a journalist to reveal her/his source is the judiciary in a secret session (Legislative Decree 108 for 2011). It is important to note the ongoing conflict and journalism safety issues in Syria, however, and concerns have been raised about the application of this decree (RSF 2011a).

Regional Conclusion

Over the period 2007-2015, 6 out of 7 countries examined in this UNESCO region experienced developments pertaining to source protection laws, across the relevant issues set out above. As with the African region, many of these developments have relevance to both digital and non-digital dimensions of source protection, but again there was not a lot of attention in the region to the purely digital space in the period under study.

6.3. Asia and The Pacific

In 2007, Banisar noted that: "A major recent concern in the region is the adoption of new anti-terrorism laws that allow for access to records and oblige assistance. There are also problems in many countries with searches of newsrooms and with broadly defined state secrets acts which criminalise journalists who publish leaked information". Developments since 2007 highlight increasing risks to source protection.

Of the 24 countries analysed in the Asia and Pacific region for this report, 18 (75%) have exhibited developments since 2007 that are potentially or directly relevant to the protection of journalists' sources.¹⁴

Countries with relevant developments 2007-2015:

- Australia
- Cambodia
- China
- India
- Indonesia
- Japan

¹⁴ Myanmar was not included in this study due to the methodology based on updating only the UNESCO Member States identified in the 2007 Privacy International report that was adopted as baseline research. However, there were noteworthy developments in the country between 2007-2015. These include 1) Surveillance (<http://en.rsf.org/burma-surveillance-of-media-and-internet-17-05-2011,40296.html>); 2) Journalists and others have faced organized cyber-attacks and attempts to infiltrate their e-mail accounts. (https://freedomhouse.org/report/freedom-world/2014/burma#.VPEr_MazJNl); 3) Amendments to Section 33 of the Electronic Transactions Law (2013) which criminalise "receiving or sending" information related to acts detrimental to state security, law and order, national solidarity, the national economy, or the national culture. Iran was also not included in this Study based on the methodology of updating the original baseline study countries, but the author also noted developments there that warrant further research.

- Kyrgyzstan
- Malaysia
- New Zealand
- Pakistan
- Philippines
- Singapore
- The Republic of Korea
- Sri Lanka
- Tajikistan
- Timor-Leste
- Turkmenistan
- Uzbekistan

There are a number of areas of concern in the Asia-Pacific region which have potential or actual bearing on source confidentiality.

a. National Security/Anti-terrorism impacts

In the Asia-Pacific region, there is an emerging trend where national security case law, legislation and/ or policy considerations demonstrate the potential to impact on journalists' source protection.

In China, journalists do not have the right to protect their sources under the Law of the People's Republic of China on Guarding State Secrets (Gov.cn 2010), nor under the Regulations on Secret-Keeping in Press and Publications (Xinhua 2013). China's National People's Congress considered an Anti-Terrorist Act at its meeting in March 2015. The Act contained a series of articles providing for legal large-scale monitoring and surveillance of citizens' communications, both online and offline. It also contained legal provisions that would enable the imposition of substantial restrictions on the activities, movement and ability of citizens to associate with any person suspected of terrorism (NPC 2015). At the time of writing, the draft law had been circulated for comment (Hewitt 2015).

In Macau, China, a Special Administrative Region of the People's Republic of China (PRC), national security laws were enacted in 2009 with offences punishable by sentences of up to 25 years (Macau, China: National Security Law, 2/2009). The law includes provisions covering state secrets (Article 5) without providing exceptions that could apply to journalists and whistleblowers (CECC 2009).

In Pakistan, investigative journalist Umar Cheema was kidnapped by unknown assailants in his country in 2010. His abductors took away his mobile phone and some of his sources later advised him about harassment they had experienced following his kidnapping, he told researchers on this study (Cheema 2014; Perlez J 2010; CPJ 2011).

In Australia, new anti-terrorism legislation (*National Security Legislation Amendment Bill* (No. 1) 2014) could see journalists jailed for up to 10 years for reporting on 'disallowed' national security stories, including those dependent upon confidential sources (Posetti 2015b; Williams 2014; See also Pearson & Fernandez 2015b). In 2015 the Federal Government classified information pertaining to asylum seekers on national security grounds. On the same basis, in mid-2015, the Australian Government criminalised the leaking of such information (Australian Border Force Bill 2015; Farrell 2015; Barns and Newhouse 2015).

In December 2013, Japan's parliament passed the *Act on the Protection of Specially Designated Secrets* (Act on the Protection of Specially Designated Secrets Act, No. 108, December 13, 2013). The law grants heads of state organs the power to designate as state secrets information connected to prevention of 'designated harmful activities', including matters in the realm of counter-terrorism, foreign affairs and defence. Unauthorized disclosure of such information is punishable by up to 10 years in prison (Freedom House 2014i). Whistleblowers and journalists found guilty of intentionally receiving such designated information can be jailed for up to five years under the Act (see Coliver 2014).

In Sri Lanka, the 1973 Press Council Act prohibiting disclosure of fiscal, defence, and security information, was revived in 2009. In June 2012, Sri Lankan police officers with support of a court order searched the offices of two news websites and confiscated equipment (*Colombo Telegraph* 2012; CPJ 2012c; Farook Thajudeen T. 2012; IFEX 2012; *New York Times* 2012). In 2012, the Sri Lanka Government amended the 1973 Sri Lankan Press Council Act so that websites would be governed by the same provisions that regulate the print media, which includes a prohibition on the publication of official secrets (Sri Lanka: Law No. 5 of 1973, Press Council Law [Sri Lanka], Chapter 378, 30 May 1973¹⁵).

In 2012, Malaysia passed the Security Offences (Special Measures) Act (SOSMA) 2012. In the act, the term 'security offence' is broadly defined as 'an act prejudicial to national security and public safety' (Spiegel 2012). SOSMA prohibits the possession or publication of 'detrimental' documents, which constitutes a security offence under the legislation. The term 'detrimental' is not defined. The legislation also permits police to intercept communications without judicial oversight. The Public Prosecutor is also granted authority to intercept postal articles and messages transmitted and received if it is likely to 'contain any information relating to the commission of a security offence.' (s6(1) of the Security Offences Special Measures Act; ARTICLE 19 2012).

b. Mass Surveillance and targeted surveillance

In China, communications between reporters, or with their sources via the Internet, or with digital devices, are subject to monitoring under Article 14 of the State Council Order No. 292 (2000), which grants government officials full access to information from providers of Internet services. In China (Hong Kong), the Interception of Communications and Surveillance Ordinance (ICSO Cap 589), enacted in 2006, requires a law enforcement agency in its application for authorization of interception or covert surveillance to state clearly whether journalistic material may be obtained in the operation (ICSO Cap 589 Schedule 3, Part 1 (ix), Part 2 (x), Part 3 (x)). In 2009, the Commissioner on Interception of Communications and Surveillance noted several incidents involving the interception of phone calls in which journalistic materials were obtained inadvertently. While the law itself does not require an agency to report such interceptions to the panel or the Commissioner,

the ICSO code of practice was amended in 2011 to require law enforcement agencies to notify the Commissioner of any operations that are likely to involve journalistic material or where such information had been obtained inadvertently. In 2013, after a two-year review of ICSO, the Hong Kong Government reported to the Legislative Council that it was drafting several legislative amendments, including one that would give the Commissioner access to materials produced under interception or surveillance, including journalistic material. However, at the time of writing, no new amendments had been introduced.

In the Philippines, the Supreme Court declared that s12 of the *Cybercrime Prevention Act* 2012 RA 10175 – which permitted the real time collection of data – was unconstitutional (Palatino, 2014; Danguilan-Vitug 2014).

Indonesia passed a state Intelligence Law in 2011. Article 32 of the legislation permits intelligence agencies to intercept communications without prior court approval, and without protections that could apply to journalistic communications (Freedom House 2013g, 2014f).

A law introduced in Pakistan in 2013, called the Investigation for Fair Trial Act 2013, gives the power to the state to intercept private communications in order to track suspected terrorists.

In New Zealand, the Search and Surveillance Act 2012 (New Zealand Parliamentary Council Office 2012) was introduced, legalising some forms of surveillance, extending surveillance powers to additional government agencies, and empowering judges to determine if journalists would be permitted to claim privilege (under Section 68 of the 2006 Evidence Act) in connection with warrants issued under the Act. While the Act recognises journalistic privilege, it states:

- “no privilege applies in respect of any communication or information if there is a prima facie case that the communication or information is made or received, or compiled or prepared,—
- (a) for a dishonest purpose; or
- (b) to enable or aid any person to commit or plan to commit what the person claiming the privilege knew, or ought reasonably to have known, to be an offence.

Also in New Zealand, the intelligence agency GCSB is reported to collect calls and Internet traffic in bulk and share this with the US National Security Agency (NSA), according to documents released by Edward Snowden and reported by *The Guardian* early 2015 (Manhire 2015).

In India, the Information Technology (Amendment) Act, 2008, allows the government to intercept, monitor, or decrypt computer information in the interest of “sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States, or public order, or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence” (India, 2008; HRW 2013a; Bhatia, 2015).

Surveillance software linked to the state

As referenced earlier in this Study, in May 2013, researchers from Citizen Lab (Citizen Lab 2013) found evidence of FinFisher servers in 25 countries, including several in the Asia-Pacific region, which raised fears that government agencies may be using the software to

monitor (via backdoor access) their citizens. The deployment of such software directly can undermine legal protections designed to ensure confidentiality for journalists' sources.

c. Data retention and Third Party Intermediaries

In April 2015, a Pakistani parliamentary committee approved a bill that mandated service providers to retain data about Pakistanis' telephone and email communications for a minimum of one year. Called the Prevention of Electronic Crimes Act, it permits government authorities access to the data of Internet users without a requirement for judicial review, nor any exception for journalistic communications (HRW 2015b; PEC Bill 2015; HRW 2015b; RSF 2015b and RSF 2015c).

New data retention legislation in Australia demands that third party intermediaries store data for two years. The data retention Bill (Telecommunications and Interception Access Amendment Bill 2014), as it was proposed and initially approved by the Parliamentary Joint Committee on Intelligence and Security (APH 2015) did not provide safeguards that could provide for source protection. However, when the legislation was enacted in March 2015 it included an amendment (Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014) that requires agencies to seek a warrant to access journalists' communications with sources in certain cases. Transparency is however not required, nor is there a possibility to appeal the issuance of a 'Journalism Information Warrant'. Revelation of the existence (or non-existence) of such a warrant is punishable by a two-year jail term. Under the amendment, 'public interest advocates' will be appointed by the Prime Minister to advise on specific cases.

In Cambodia, in October 2014, the director of the Telecommunication Regulator of Cambodia (TRC), ordered 12 mobile phone and Internet providers to be studied by police. Information analysed included billing records, network information, and data logs (Pheap A and Wilwohl J 2014; Telecommunication Regulator of Cambodia 2014).

d. Entitlement to protection: Who is a journalist/What is journalism?

Five of the 24 countries studied in the Asia-Pacific region reflected developments in policy and case law pertaining to definitions of 'journalist' and 'journalism'.

In Australia, six out of nine jurisdictions (at federal level and in New South Wales, Victoria, Western Australia, the Australian Capital Territory and Tasmania) have introduced shield laws. Three out of those six are potentially broad enough to cover bloggers (*Evidence Act 1995* Cth, s126G (1), *Evidence Act 2001* ACT, s 126J, and *Evidence (Journalists) Amendment Bill 2014*, Part 8A—Journalists 72—Interpretation) (Fernandez 2014). Also in Australia, the protections for journalistic data contained within the Telecommunications and Interception Access Amendment Act 2015 are afforded to "a person who is working in a professional capacity as a journalist". Similarly, sources who might benefit from this amendment are only covered if their interactions are with "professional journalists" in the course of professional news media production (Hurst 2015).

The Banisar (2007) report documented the codification of 'journalist' in a New Zealand shield law in 2006 (*Evidence Act 2006*, s 68). Significantly, in 2014, a High Court judge extended the protection to a political blogger who was deemed to be a journalist, and his blog was accepted as a news medium. But it is important to note that the court ordered the source

to be revealed as the 'public interest' involved in this particular case favoured disclosure (*Slater v Blomfield* [2014]). The decision also relied on tests like 'regularity' and 'effort' of news production which could exclude occasional acts of journalism. Nevertheless, it does offer a broader definition of journalistic acts.

In 2010, the Chinese Government introduced a national "Qualification Examination" for Journalists. Administered by the General Administration of Press and Publication, the government's main regulator of the press, all practicing and prospective journalists must pass a new qualification exam. In addition to screening of journalists, this development excludes bloggers and other digital communicators from claiming ethical obligations under the China News Workers Code of Professional Ethics.

In 2007, a court required a Reuters journalist to reveal her source in Singapore (*Tullett Prebon (Singapore) Ltd and Others v Spring Mark Geoffrey and Another* [2007] 3 SLR 187; [2007] SGHC 71). However, in 2014, the Singaporean Court of Appeal protected a blogger from revealing his source, although a lower court had decided that he was not a journalist (*James Dorsey Michael v World Sport Group* [2014] SGCA 4).

In Timor-Leste, the 2014 Press Law defines the term 'journalistic activity' to encompass research, collection/selection of information; processing and dissemination of information in the form of written text, sound or image to the public through disclosure in the media. (*Decree No. 10/III Media Act*, Article 2, a)). However, the term 'journalist' is limited to a professional who is primarily engaged in journalism. The profession of journalist under this media law is further constrained by the requirement of a professional license (*Ibid*, article 13, i)) which is issued and controlled by a press council, internship requirements and a Bachelors-level qualification in the field. Shortly after being approved by Timor Leste Parliament, the Press Law was referred to its highest court by President Taur Matan Ruak, which deemed some sections unconstitutional in August 2014 (East Timor Law and Justice Bulletin 2014; Pacific Media Centre 2014).

e. Other digital developments

In June 2014, the State Administration of Press Publication Radio Film and Television (SAPPRFT) – the agency responsible for oversight of China's media - issued new measures aimed at preventing Chinese journalists from sharing certain information on their personal blogs and social media accounts, and with foreign news media. The new provisions forbid journalists and media employees from sharing certain state secrets, trade secrets, intellectual property and undisclosed information obtained during professional activities (Politics 2013). All journalists are required to sign an agreement to pledge compliance with the regulations.

In October 2014, police seized digital devices from the home of New Zealand investigative journalist Nicky Hagar (Fisher 2014). At the time of writing (July 2015), Hagar was challenging the legality of the raid in the High Court of New Zealand, citing concerns about source protection.

There were two searches of Australian newsrooms during the period by the Australian Federal Police (AFP). In both cases, the searches involved targeting journalists' computers and mobile phones to access data (*The World Today* 2011; Bartlett 2015). This example is not provided with the presumption that confidential journalistic data was unduly exposed.

In the second incident, in 2014, police apologised to a TV station in Sydney after searching the newsroom in an attempt to establish if a convicted drug trafficker had been paid for an interview in a 'proceeds of crime' investigation. Documents and computers were seized during the search, but the Federal Court overturned the warrants that were issued to procure them, and the items were later returned (ABC NEWS 2014). This example is not provided with the presumption that confidential journalistic data was unduly exposed.

In Kyrgyzstan in 2008, authorities with support of a court order searched the offices of a newspaper, confiscating financial records and computers in a criminal investigation (CPJ 2008; RSF 2008; WAN-IFRA 2008). This example is not provided with the presumption that confidential journalistic data was unduly exposed.

In Uzbekistan, a freelance journalist was detained briefly at Tashkent airport in August 2011 and had digital equipment taken (RSF 2011b; Freedom House 2012h; Ferghana 2011). This example is not provided with the presumption that confidential journalistic data was unduly exposed.

f. Anonymity issues

China has enacted new regulations requiring real-name registration for use of digital and social media. In December 2012, the National People's Congress (NPC) approved a law requiring real-name registration for Internet access. The real-name registration system was subsequently enacted for the social network Sina Weibo in 2012 (Xinhua 2012), and for instant messaging systems in 2014. In April 2013, The Ministry of Industry and Information Technology (MIIT) drafted a law requiring real-name registration for setting up any phone line or mobile connection in the country. Four months later, China's three major telecommunication companies began to require all subscribers to register with their real name and national ID number. In January 2014, the State Administration of Radio, Film, and Television (SARFT) issued a notice to video-hosting websites stating that anyone who uploads a video to the Internet must be registered using their real name. In 2015, the State Internet Information Office announced the implementation of a comprehensive real-name registration and oversight system, which covers microblogs, Baidu's Tieba (discussion) forums, and other sites with user-generated content (CAC 2015).

In the Republic of Korea in 2012, the Constitutional Court rejected a 'real name law' introduced in 2007 on the grounds that it reduced freedom of speech (Ramstad 2012).

g. Other dimensions

The China News Workers' Code of Professional Ethics (Xinhua 2009) stipulates that the reporters should defend the legal rights of sources. It is a voluntary code. Chinese courts can require journalists to reveal the identity of sources in a criminal case. According to Beijing-based lawyer Shi Hongying, all citizens have the obligation to testify in criminal cases according to Article 60 of the criminal law (Fawan 2013).

A company filed a suit in 2012 against the Guangzhou-based *Southern Weekend* newspaper and *The Beijing News*, charging that the papers printed articles that defamed the organization. The court ruled against the papers on the grounds that their articles contained anonymous sources and that the papers had refused to disclose the sources to the court (China File 2014).

In Hong Kong, China, the Interpretation and General Clauses Ordinance was used in 2013 by the Independent Commission Against Corruption which went to court to apply for orders to try to compel two media organizations to produce interview tapes and notes for its officers to use in criminal investigations. It was the first time that a law enforcement agency had resorted to production orders since the enactment of the 1995 law, which offers additional protection to journalistic material. The applications were ultimately rejected by a judge (Buddle 2015).

A number of cases have tested the protections of the shield laws passed in six Australian legal jurisdictions since 2011. A recent judgment deemed that discovery orders were permitted to uncover sources if the only 'tangible risk of adverse consequences' was the risk of a source being sued for defamation (*Liu v The Age Company* [2012] NSWSC 12) (Fernandez 2014). In 2014, an Australian academic launched legal proceedings against a publication in an attempt to force the revelation of the source of published emails containing remarks he made. The court rejected claims of a breach of privacy levelled by the litigant, and the application to reveal the source was dropped (*New Matilda* 2014). In another case (*Newspaper Ltd v Bond, 2009; Hancock Prospecting v Hancock 2009*), the Supreme Court of Western Australia dismissed a private individual's request for a journalist to hand over source information (Lidberg 2013). A separate bid by the same individual to pursue sources cited in an unauthorised autobiography failed on the basis of the precedent set in the first case and in terms of the applicability of Western Australia's new shield laws (Weber 2014; *Hancock Prospecting v Hancock, 2013; WASC 290*).

Also in Australia, it was reported by *Guardian Australia* in 2015 that several Government agencies had referred cases of confidential source-dependent journalism, about issues affecting asylum seekers, to the Australian Federal Police (AFP) for investigation into "unauthorised disclosure of commonwealth information", with a view to identifying the sources and other whistleblowers (Farrell 2015 a).

In Tajikistan, a new media law was introduced in 2013 that effectively reversed an obligation on journalists to identify sources (See Article 32 'Journalists' Duties', The Law of the Republic of Tajikistan). In Article 26, the new law imposes a legal obligation upon journalists not to reveal their sources (See related discussion in Case Study 2; ARTICLE 19, 2014)

In Timor-Leste, the National Congress of Journalism, an historic gathering of the country's journalists approved a new journalism Code of Ethics in 2013 (Republica Democratica De Timor-Leste, 2013; Pearson 2013). This was enshrined via a new media law that was approved in the National Parliament in May, 2014. Article 19, subsection 4 of the Code of Ethics protects the journalists' right to professional secrecy, stating that journalists 'may not be forced to disclose their sources of information, except when so ordered by a court under the criminal procedure law' (Decree No. 10/III).

In another development, Turkmenistan introduced a media law in 2013. Among other things, the duties of a journalist are defined, and these include the need to maintain the confidentiality of information and/or its source (article 31, subsection 5). Journalists are not entitled to identify the person who provided the information on condition of non-disclosure of her/his name, except in the case of a corresponding demand from the court (article 39). The law had not been tested at the time of writing.

In Malaysia, a Court of Appeal judgement found that a reporter did not have to reveal the sources of a story in a defamation case (Mageswari, 2014). In a second case, in 2010 The Star Publications sought judicial review on a case in which a journalist refused to hand over

notes for examination (Hong Chieh 2010; Loh 2010). The review was granted but The Star later withdrew the challenge (Sun Daily 2010).

Regional conclusion

The region experienced developments over the period in 18 of 24 countries surveyed, as regards the issues of a) national security/anti-terrorism impacts; b) Surveillance; c) Data retention/handover and the role of third party intermediaries; d) Questions about entitlement to claim source protection; e) Other digital dimensions (digitally stored journalistic communications being seized), f) Anonymity issues, and g) Other dimensions.

6.4. Europe and North America

i. Europe

“The protections are strongest in Europe where the European Court of Human Rights has specifically found in favour of the right of protection and the Council of Europe has issued detailed guidelines on the protections” (Banisar 2007 p. 13).

Since 2007, developments have been identified in 23 European countries, out of the 36 (64%) examined as a subset of UNESCO Member States identified for study.

The 23 countries¹⁶ exhibiting developments in regard to source protection between 2007-2015 are:

- Armenia
- Austria
- Belarus
- Bulgaria
- Czech Republic
- Estonia
- France
- Georgia
- Germany
- Hungary

¹⁶ Slovenia is also a UNESCO State where further research is recommended. It fell outside this Study's scope, however the author noted relevant developments, as reported by a Slovenian academic survey respondent, including limits of the existing legal source protection framework in the digital era. Additionally, an investigative journalist faced criminal charges after publishing information allegedly based on leaks (OSCE 2014 <http://www.osce.org/fom/151736>). She was called to reveal her sources during the trial but the prosecutor withdrew the charges before a verdict was delivered <http://globaljournalist.org/2015/04/slovenia-drops-state-secrets-charge-against-reporter/>. Similarly, a 2010 case in Serbia is noteworthy – it was also not included in this study on methodological grounds (C.f. the case of Bojovic and Spasic). <http://journalism.cmpf.eui.eu/discussions/europes-journalists-caught-in-widening-national-security-net/>.

- Iceland
- Ireland
- Israel
- Lithuania
- Netherlands
- Poland
- Portugal
- Russian Federation
- Slovakia
- Switzerland
- The former Yugoslav Republic of Macedonia
- Turkey
- United Kingdom of Great Britain and Northern Ireland

The Media Legal Defence Initiative's Peter Noorlander, interviewed for this study, commented that there was a steady stream of cases before the European Court of Human Rights, where police had used search and seizure laws and argued that not all journalistic material qualified as confidential. He added: "The European Court has held a high line and declared violations of source protection and the right to freedom of expression in (nearly) all these cases, but the States concerned have been slow to implement them" (Noorlander 2015).

The Organisation for Security and Cooperation in Europe's (OSCE) *Safety of Journalism Guidebook* (Horsley 2012) noted "persistent threats of prosecution which contradict the accepted right to the protection of sources are of concern". The OSCE's Representative on Freedom of the Media, Dunja Mijatović, has also routinely condemned threats to legal source protection frameworks in Europe and North America during the period.

a. National Security/Anti-terrorism impacts

In January 2015, the attack on the *Charlie Hebdo* newspaper in Paris, European Interior Ministers issued a joint statement in the immediate aftermath of the attack explaining the need to take measures in the interests of national security (EU 2015; Posetti 2015a).

Earlier, the Snowden revelations also led to actions by governments in Europe that have impacted on the protection of sources, in instances such as the requirement that *The Guardian* destroy hard drives (Majumdar 2013), and the detention of a journalist's partner at Heathrow airport, along with the concurrent seizure of journalistic material (Bowcott 2014).

In early 2015 *The Guardian* published a new cache of Snowden files that reported that a UK Government Communications Headquarters (GCHQ) information security assessment listed "investigative journalists" in a threat hierarchy (Ball 2015). In June 2015, the UK's Independent Reviewer of Terrorism Legislation, David Anderson QC published the report

A Question of Trust: Report of the Investigatory Powers Review (Anderson 2015) which stated that: "... the ability of a whistleblower to reveal state misconduct and of a journalist to report it requires an assurance that the journalist's sources will not be made known to the state" (See also discussion of Anderson's recommendations in the Mass Surveillance and Data Retention sections below).

Also in the UK, the Terrorism Act (2000) has been used to require materials from journalists who investigated or interviewed terror suspects. In 2008, a freelance journalist was required to hand over data pertaining to communications with a terror subject during research for a book. The High Court conducted a judicial review of the case and required the journalist to hand the material directly gathered from the suspect, but further ruled that he was not required to give up materials gathered from other sources (*Shiv Malik v Attorney General* [2008] EWHC 1362) (Fitzsimmons 2008).

In 2009, Germany adopted an anti-terrorism law that provided greater power to authorities (namely the BKA – Germany's Federal Criminal Police Office) to conduct covert surveillance (Spiegel Online International 2008). Paragraph 20 of the law provided journalists' communications, along with those of doctors and lawyers, to be intercepted in the absence of a requirement for probable cause if a public interest was detected (Hawley 2009, see also McGauran 2009).

The French Senate passed new anti-terrorism legislation in June 2015 (*Loi renseignement* 2015) that expanded surveillance powers and granted law enforcement agencies special surveillance powers, including new monitoring processes and methods of investigation with limited judicial oversight (OSCE 2015).

Hungary introduced new media legislation in 2010 in terms of which a journalist protecting a source (or associated data) could be fined up to €661,000, and a publisher fined €180,000 if there was an issue of 'state security' (Mayr 2011). This legislation was then amended in 2012 following a Constitutional Court judgement. According to the amendment, sources must be disclosed only if they provide evidence that would be necessary to resolve a criminal case. Judges enjoy a large margin of discretion in balancing the journalist's obligation to protect the source and the need to disclose the information in order to solve a criminal case (European University Institute: 2014; Falchetta 2015).

b. Mass surveillance and targeted surveillance

In France, in 2013, article 13 of a new law was introduced, enabling significantly expanded government surveillance of French citizens (Assemblée Nationale (b): 2013). The new law allowed a wide range of public officials (including police, gendarmes, intelligence and anti-terrorist agencies, as well as several government ministries) to directly monitor computer, tablet and smartphone use in real time, and without prior authorisation, for the purpose of gathering metadata (Willsher 2013). This legislation contains no exemptions that could apply to journalistic communications.

In July 2015, CNN reported that NSA surveillance of German journalists and their sources had led to a foreign agency revealing the identity of one of these sources to the German Government in 2011 (Tapper 2015; *Der Spiegel* 2015).

In February 2015, an opposition leader in the Former Yugoslav Republic of Macedonia claimed that he had obtained evidence that over 20,000 citizens had been subjected to

unauthorized surveillance (IFEX 2015). Among the reported targets were more than 100 journalists. According to Deutsche Welle, the journalists were invited to the opposition party's headquarters to collect folders and documents filled with transcripts of their conversations spanning a two-year period (Georgievski 2015).

An instance of wiretapping of journalists in Lithuania was declared illegal by the Vilnius Regional Court in August 2014 (OSCE 2014c). The Vilnius District Court had sanctioned wiretapping of BNS news agency journalists at the end of 2013 at the request of the Special Investigation Service following an article (based on confidential sources), which was published by BNS. The regional Court also found that secret surveillance, searches and an order to reveal the sources of information were unlawful.

In 2014, the UK's Bureau of Investigative Journalism (BIJ) and a journalist filed an application with the European Court of Human Rights (Bureau of Investigative Journalism and Alice Ross v. The United Kingdom (2014) 62322/14) to rule on whether UK legislation properly protects journalists' sources and communications from government scrutiny and mass surveillance. The case argued that bulk collection of communications data, using methods such as Internet cable tapping, breaches international human rights law (Oldroyd 2014). It was argued by the Bureau that the UK Government's practices of intercepting, collecting, storing and analysing data, including metadata, under the Regulation of Investigative Powers Act 2000 (see discussion on RIPA in the Data Retention section below) make it substantially harder for journalists to guarantee confidentiality to their sources (ECHR 2014).

A number of other surveillance developments with relevance to source protection have occurred in the UK. The country's Investigatory Powers Tribunal (IPT) found in early 2015 that the regime governing the sharing of electronic communications collected by Britain and the US had been unlawful until disclosures were made by the UK's Government Communications Headquarters agency (GCHQ) in 2014 (06/02/15 IPT/13/77/H Liberty & Others vs. the Security Service, SIS, GCHQ; Bowcott a 2015). However, the NSA-GCHQ relationship was deemed legal from the point at which it had been disclosed (05/12/14 IPT/13/77/H Liberty & Others vs. the Security Service, SIS, GCHQ.) The litigants announced their intention to appeal to the European Court of Human Rights.

Also in 2015, the UK's Home Office published a Draft Equipment Interference Code of Practice (UK Government 2015) which references journalistic source confidentiality and suggests that particular consideration should be given when accessing such data through means it describes as "equipment interference". Point 3.23 states that: "Confidential journalistic material includes material acquired or created for the purposes of journalism and held subject to an undertaking to hold it in confidence, as well as communications resulting in information being acquired for the purposes of journalism and held subject to such an undertaking". The Code requires agencies to carefully consider the necessity and proportionality of moves to access such data, to detail the reasons for doing so, to destroy the data when it is no longer needed, and to take reasonable steps to ensure the data is marked 'confidential' if it is handed to outside bodies. However, it does not indicate a data retention time limit (Travis 2015).

Further in 2015, the UK parliament's Intelligence and Security Committee (ISC) released a report titled *Privacy and Security: A modern and transparent legal framework*, which noted that the authorities had capacity to trawl massive sets of personal data without statutory oversight. It also found that the UK's legal framework has developed in a "piecemeal" manner, was "unnecessarily complicated" and lacked transparency (ISCP 2015).

In his report released in June 2015, the UK Independent Reviewer of Terrorism Legislation, David Anderson QC, recommended judicial review of requests for interception warrants to acquire communications data of people who handle privileged or confidential information, including journalists. Anderson also proposed that the authorisation should be flagged for the attention of the Independent Surveillance and Intelligence Commission (ISIC) in the interests of accountability and transparency. Recommendation 68 of his Report states: "If communications data is sought for the purposes of determining matters that are privileged or confidential such as...the identity of or a journalist's confidential source, the Designated Person should be obliged either to refuse the request or to refer the matter to ISIC for a Judicial Commissioner to decide whether to authorise the request" (Anderson 2015). At the time of writing, the UK Government had not committed itself to Anderson's recommendations (Sparrow 2015). However, in 2015 it indicated that it would soon bring forward new legislation (Lomas, 2015).

When the research for this Study was completed in July 2015, there were several other significant UK cases pertaining to surveillance pending in UK and European courts with potential implications for source protection in the digital age.

In Bulgaria, in the course of an ensuing government investigation into the beating of an investigative journalist, mass wiretapping of journalists and government officials was revealed (Basilie 2009; OSCE 2008; Slate 2009).¹⁷

According to the Russian state news agency Ria Novosti (РИА Новости), the number of intercepted telephone conversations significantly increased between 2007 and 2012. While the Federal Security Service (FSB) is the principle agency responsible for communications surveillance, several other Russian security agencies can access a surveillance system in accordance with provisions on privacy in the Constitution (article 23), the federal law on surveillance (Об оперативно-розыскной деятельности) and other laws (Constitution of the Russian Federation 1993; Federal law on surveillance N 144-ФЗ; Federal Law on communications N 126-ФЗ; Ria Novosti 2013; Lewis J A 2014; World Policy 2013).

Polish newspaper Gazeta Wyborcza published an article in 2010 claiming that a number of political journalists were under illegal surveillance. Between 2005 and 2007, Polish intelligence agencies obtained and analysed the telecommunications data from the author of the article (Szymielewicz & Walkowiak 2014). In 2011, the journalist took civil action against one of the agencies, and in 2012, a Warsaw district court ruled that the use of his telephone data violated his right to privacy and constituted a breach of his freedom of expression rights. The court ordered the agency to apologise to the journalist and required it to delete all data relating to him.

In Turkey, a law expanding the powers of the National Intelligence Agency came into force in April 2014 which permits collection of Internet traffic data (Turkey 2014).

Belgium's Law on Protection of Journalists' Sources (2005) prohibits the use of 'any detection measure or investigative measure' of any protected media person unless it is authorized by a judge under the same restrictions as required to compel a journalist to reveal his/her source of information.

17 There have been legislative developments subsequently:
http://sofiaecho.com/2009/12/22/834248_electronic-communication-act-amendments-for-first-reading-in-parliament ;
<http://history.edri.org/edigram/number8.1/bulgarian-protests-data-retention> ;
<http://www.novinite.com/articles/167509/Bulgarian+Parliament+Adopts+Changes+to+Electronic+Communications+Act>;
<http://www.bta.bg/en/c/ES/id/1044976>

c. Data retention/Third party intermediaries

Protection of journalistic sources in relation to data retention and access, and in relation to Internet companies, was the subject of debate in the UK in 2014/2015, following two high profile cases where police accessed journalists' communications records with the explicit aim of identifying sources, using the Regulatory Investigative Powers Act (RIPA) to do so (Turvill 2014).

Confidentiality of journalistic sources in the UK is protected by the Police and Criminal Evidence Act (PACE) of 1984 which excludes certain material from seizure, including:

- Journalistic material which a person holds in confidence and which consists—
 - i. of documents; or
 - ii. of records other than documents.

Journalistic material is defined as follows:

- A person holds journalistic material in confidence for the purposes of this section if—
 - a. He [or she] holds it subject to such an undertaking, restriction or obligation; and
 - b. It has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation, since it was first acquired or created for the purposes of journalism.

The Regulation of Investigative Powers Act (RIPA 2000), originally intended to safeguard national security as an anti-terrorism measure, allows police to circumvent the PACE. *The Sun* newspaper has applied to the Investigative Powers Tribunal for a review of the Metropolitan Police's use of RIPA to access and analyse mobile phone records (O'Carroll 2014). It is alleged that the police action breached Article 10 of the European Convention on Human Rights in ordering Vodafone to hand over the records (Ponsford 2015c). Since the application was lodged, it has been revealed that the phone records of two other *Sun* journalists were also intercepted in the course of the same police investigation (Ponsford & Turvill 2015).

Also in 2012, Essex police accessed the phone data of two Mail on Sunday journalists in the course of a leak investigation into the newspaper's coverage of speeding fines issued to a former cabinet minister (Greenslade 2014).

A report assessing the nature of the RIPA surveillance powers was published in mid-2015 by the Interception of Communications Commissioner, Sir Anthony May (May 2015). It found that the RIPA legislation 'did not provide adequate safeguards to protect journalistic sources' (Press Gazette 2015). Specifically, it found:

- In the three-year period covered by the inquiry, 19 police forces sought communications data in relation to 34 investigations into suspected illicit relationships between public officials (sources) and journalists.
- 608 applications were authorised to seek this communications data

The result was that police forces were able to secretly view phone records of 82 journalists during the period, allowing them to identify the journalists' sources (Ponsford 2015a). May's report recommended that: "Judicial authorisation is obtained in cases where

communications data is sought to determine the source of journalistic information” (May 2015; *The Guardian* 2015). The report also stated that the police forces did not give the question of necessity, proportionality and collateral intrusion sufficient consideration (Bureau of Investigative Journalism 2015).

In May 2015, in response to growing concerns about the impact of RIPA disclosures on journalistic source protection, temporary measures were introduced to amend the UK Serious Crime Bill. The new rules required the police force to seek judicial approval before viewing a journalist’s phone records in a criminal investigation.¹⁸

In July 2014, the Data Retention and Investigative Powers Act (DRIPA) was fast-tracked into law, requiring bulk retention of data for 12 months, and extending the definition of telecommunications services in RIPA to include email and other Internet-based services, without exceptions for material covered by legal, medical or journalistic professional confidentiality. In July 2015, the High Court of Justice declared bulk data retention under the DRIP Act illegal (Case No: CO/3665/2014, CO/3667/2014, CO/3794/). According to the judgement, aspects of the Act were unlawful because they breached Articles 7 and 8 of the EU Charter of Fundamental Rights (BBC 2015a). They declared that section 1 of the act “does not lay down clear and precise rules providing for access to and use of communications data” and should be “disapplied”. The court identified two key problems with the law: 1) it did not provide for independent court or judicial scrutiny to ensure that only data deemed “strictly necessary” is examined 2) there was no definition of what constitutes “serious offences” in relation to which material can be investigated. They suspended their order until March 31 2016 in order to “give parliament the opportunity to put matters right”. The Home Office security minister announced that the UK Government would seek to appeal the judgement (Bowcott 2015b).

In April 2012, Austria introduced a data retention law, which required telecommunications companies and Internet service providers to store user data for up to six months. This was then ruled unconstitutional by the Austrian Constitutional Court, as it violated fundamental European privacy rights (PC World 2014). A 2012 Security Policy Act enabled monitoring, wiretapping, filming and geolocation of individuals by state authorities (Freedom House 2014a).

In Germany, a data retention law passed in 2008 was overturned in 2010 by the Federal Constitutional Court and declared unconstitutional because it breached German privacy laws. The law had required telecommunication companies and Internet-service providers to store citizens’ communications data, including their Internet browsing history, for up to six months. Additionally, it permitted the wiretapping of lawyers, doctors, and journalists under certain circumstances. The Supreme Court found that there were insufficient safeguards and oversights and it ordered that all previously retained data be deleted immediately (Freedom House 2011a; *Der Spiegel* 2010; ERDI 2010).¹⁹

In 2011, however, Germany’s Constitutional Court found that the legislature did not have to provide journalists the same confidentiality protections applied to other professions, such as lawyers. (Freedom House 2012a).

18 See also the discussion of the News of the World ‘phone hacking’ scandal in the next section of this report
 19 Romania is not covered in this Study’s analysis on methodological grounds, but it can be noted that the country’s Constitutional Court also twice ruled that country’s data retention laws unconstitutional (in 2009 and 2014) c.f. <https://edri.org/romania-aftermath-of-second-ccr-data-retention-ruling/>

At the time of writing, the Polish Constitutional Court was considering six complaints from the Ombudsman and Prosecutor General arguing for limitations on the powers available to intelligence and law enforcement operatives in Poland. In 2012, the mandatory data retention period of two years was reduced to 12 months. Two bills - one seeking to limit intelligence agencies' access to Polish citizens' telecommunications data, and the other providing for oversight of intelligence agencies' complaints processes - were under consideration in 2014 (GISWatch 2014). (See also the case of mentioned under the surveillance section above).

Dutch lawyers, journalists, privacy organizations and publishers were, at the time of writing, taking legal action against the Dutch government in opposition to legislation that requires telecom firms to store phone and email information (NU.nl 2014; DutchNews.nl 2014). Legal counsel for the complainants alleged that the legislation conflicts with judgments of the European Court of Justice in 2014.

The European Court of Justice earlier found the Irish Data Retention Directive was invalid on the grounds that it "interferes in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data" (NU.nl 2014). In response to criticism from these groups in late 2014, the Dutch Government amended the provisions, but still kept the data retention legislation on the grounds that it was needed for investigation and prosecution of serious criminal offenses (Rijksoverheid 2015).

On 23 April 2014, the Slovak Constitutional Court preliminarily suspended Slovakian implementation of the 2006 European Union Data Retention Directive, which had been given force in Slovakia under the Act on Electronic Communications. The suspension followed a case brought in September 2010 by the European Information Society Institute (EISI) against data retention in Slovakia (Husovec & Lukic 2014). The laws are still formally valid, but have no legal effect until the Court decides on the merits of the complaint.

In Belarus, several by-laws and governmental decrees have been approved in recent years, including one that requires Internet service providers to identify all Internet connections and to store data about their customers, and the websites they visit (Aliaksandrau & Bastunets 2014). Telecommunications companies must record the passport details of people who buy SIM cards Internet café staff are required to photograph users, and operators of all cafes and hotels are required to register users before supplying them with Wi-Fi access.

Georgian journalists enjoy constitutional and federal level legal protections regarding confidentiality. However, a clause limiting public agencies' direct access to surveillance data was removed from a cybersecurity law in August 2014 (IDFI 2014). The first report of the Personal Data Protection Inspector (a government authority established in 2013) on the State of Personal Data Protection noted problems of processing of a large amount of data without proper legal grounds; the illegal disclosure of personal information; and failure to meet legal requirements related to video surveillance (Freedom House 2014m).

d. Entitlement to protection: Who's a journalist? What is journalism?

A new law adopted by the Former Yugoslav Republic of Macedonia at the end of 2013 addressed the question of the definition of 'journalist' and, therefore, to whom source protection applies. The definition of journalist emphasises official contractual ties to a legacy-media newsroom (IREX 2014: 73).

Citizenship has been relevant to the issue of who is eligible to have protection of confidential sources. Wikileaks' Editor-in-Chief, Julian Assange travelled to Sweden in 2010, before moving his organisation's servers to the country. Wikileaks wanted to benefit from the country's stringent whistleblower and source protection laws. In Sweden, if a website registers with the public authorities and can prove it has an Editor-in-Chief, then it can be certified to become legally obliged to protect confidential sources (Euractiv: 2010). Under Swedish law, Assange would have needed to become a Swedish citizen in order to apply for source protection coverage. (See also detailed discussion of the status of source protection in Sweden in the digital age in Thematic Study 2).

e. Other digital dimensions

In Georgia in 2011, five photojournalists were arrested and had computers, mobile phones and other reporting equipment reportedly seized (Robinson M 2011; RSF 2011c). This example is not provided with the presumption that confidential journalistic data was unduly exposed.

In June 2014, a Polish magazine was repeatedly searched by the Prosecutor's Office and Internal Security Agency officers (OSCE 2014c). The Editor-in-Chief was required to hand over recordings and electronic devices to the authorities during the searches. This example is not provided with the presumption that confidential journalistic data was unduly exposed.

In July 2013, GCHQ officials in the United Kingdom oversaw editors destroying laptops containing the Snowden files (Fitzsimons et al 2014). *The Guardian* stated that it had been threatened with legal action by the Government to recover the laptops unless they agreed to destroy the data (Borger 2013; Harding 2013). By agreeing to destroy the laptops, *The Guardian* believed it was protecting both its source and its reporters.

In Hungary, the Act CLXV on Complaints and Whistleblowing came into force in January 2014. The new law ushered in an electronic whistleblowing system operated by the Commissioner for Fundamental Rights (the ombudsman). Whistleblowing reports are registered by an anonymised code and published on the Internet in a form designed to be accessible to all, without any data relating to the identity of the actual whistleblower. The process then involves the ombudsman transferring the report to the competent authority for investigation (Barker Exchange 2014). The Act emphasizes the protection of the whistleblower as required by the UN Convention against Corruption in Articles 32 and 33 (UN 2003). The whistleblowing facility follows a 2007 Pricewaterhouse Coopers study that found that whistleblowing had been very beneficial to Hungary in fraud detection and reporting economic crime. This model parallels similar systems established by news publishers in US, Africa, Latin American and Europe (see Thematic Study 1).

Publishers and source protection

The UK 'phone hacking' scandal (Davies 2014), revealed by *The Guardian*, that began at *News International's News of the World* and included a number of other UK tabloid publications, raises several complex issues in regard to confidentiality, privacy and protection of sources. The original scandal revealed that journalists using private investigators had illegally intercepted the mobile phone messages of celebrities and other citizens. This led to a number of high profile inquiries into the ethics of the UK tabloid press and several police investigations that ultimately ended with the jailing of multiple journalists and their police sources (BBC 2014).

The investigations also revealed that tabloid publications had illegally paid public officials and police as sources of confidential information. Under growing pressure, News International executives established their own investigation which worked with Pricewaterhouse Coopers to assemble a database of 300 million emails and other documents relating to journalists' phone records and expenses (Ellison 2012). Many of these records were then turned over to police by News International. These records have since been used by police to identify sources, and convict both journalists and their sources (BBC 2015b). There is also some evidence that police have used the data given to them by News International to investigate police who gave information to journalists but who were not paid (Laville 2013) – that is, confidential sources who were not in a corrupt relationship with the press. News International executives have justified the voluntary turning over of records to police (Ellison 2012), but have been criticized by both internal (O'Carroll 2012) and external critics (Crook 2014).

Also flowing from the 'phone hacking' scandal was the Leveson Inquiry into the practices of the British press. In 2012, the Leveson Report (Leveson 2012) recommended weakening the source protection rights of journalists by suggesting that the definition of excluded material in the Police and Criminal Evidence Act 1984 (PACE) be narrowed. PACE stipulates the conditions under which police can seek to obtain unpublished confidential source material (Phillips 2014). The Report recommended that protection should only be afforded to journalistic material "if it is held, or has continuously been held since it was first acquired or created, subject to an enforceable or lawful undertaking, restriction or obligation." This implies the need for an explicit obligation of confidence between a journalist and a source in order for protection to be upheld.

f. Anonymity issues

No specific developments were registered by the researchers over the period under focus.

g. Other dimensions

According to Banisar (2007), 40 countries – the vast majority of countries in Europe – had adopted some form of legal protection for journalistic sources by 2007, the only exceptions being Ireland, the Netherlands, Slovakia and Greece, and smaller jurisdictions such as the Holy See and Andorra. The following paragraphs update this 2007 assessment.

In the Republic of Ireland, protection of journalistic sources is not dealt with via statutory law. Pronouncements by the European Court of Human Rights remain the common reference point for Irish courts. For example, in 2007, two journalists from the Irish Times who were ordered by Tribunal of Inquiry to produce the original of a leaked letter published in the paper, were told by the Irish High Court to comply (Mahon Tribunal v Keena & anor [2009] IESC 78). An appeal by the journalists to the Irish Supreme Court unanimously reversed the order of the High Court in 2009. The Supreme Court held that the High Court had not 'struck the balance between the journalistic privilege derived from the exercise of the right to freedom of expression of the appellants and the public interest of the Tribunal in tracing the source of the leak'. However, the Supreme Court continued:

"The unilateral decision of a journalist to destroy evidence with intent to deprive the courts of jurisdiction is, as the High Court has held, designed to subvert the rule of law. The Courts

cannot shirk their duty to penalise journalists who refuse to answer questions legitimately and lawfully put to them"

The Supreme Court held that due to 'exceptional circumstances' - that is, the destruction by the newspaper of the documents - the *Irish Times* had to pay all costs (Cormaic, 2014) which totalled €600 000 (Greenslade 2009). The *Irish Times* appealed the costs decision to the European Court of Human Rights which rejected the application.²⁰

Slovakia legally recognised protection of journalists' sources with the Press and News Agency Act No. 167/2008, and the subsequent amendment act no. 221/2011 (National Council of the Slovak Republic 2011). Section 4 of the Act on Protection of Information Sources and Content states:

The publishers of periodicals and press agencies must not disclose the source of information acquired for publication in a periodical, or an agency news service, or any part of the content of such information which would enable the identification of the source if requested not to do so by the natural person who provided the information, and must ensure that the disclosure of the content of the information does not breach the rights of third parties; they are obliged to take the necessary precautions in the handling of documents, printed matter and other media, in particular visual recordings, audio recordings and audio-visual recordings that could be used to identify the natural person who provided the information to ensure that the identity of the information source is not revealed.

While this legislation offers stronger legal protection for journalists' sources, it does not take account of the issues identified in this study pertaining to the digital era developments that may risk undermining such legislative guarantees, including data retention (see reference to Slovakian law in the relevant section above) and mass surveillance.

Iceland ratified a new law in 2011 that strengthened journalistic source protection and freedom of expression (Hirsch, 2010, Smith 2010). A new Information Act was passed in January 2013 in which source protection is emphasised. According to the Act, journalists are not authorized to name their sources without their consent or a judge's order when it comes to a criminal case (International Modern Media Institute, 2014).

In Lithuania, amendments to the Law on the Provision of Information to the Public in July 2014 limit legal coercive action to disclose sources of information. The Law requires that it must be established that the disclosure of a source is warranted by an issue of critical public importance, or the necessity to ensure the protection of constitutional rights and freedoms, before a source is forcibly revealed.

In Estonia in 2010, the Ministry of Justice introduced legal amendments to the Criminal Code, including a provision that would allow courts to jail journalists for up to five years for refusing to disclose their sources in the context of serious crimes.

France strengthened the protection of sources with a law that took effect in 2010 (LOI n° 2010-1 du 4 Janvier 2010). It stated that journalists could only be compelled to reveal sources when the information is required for the investigation of a serious crime (The Economist 2010). In March 2012, the Paris Court of Appeals rejected a case brought by *Le Monde*. In 2013, a new bill was mooted in the French parliament (projet de loi n° 1127,

20 The ECtHR stated that future costs order would have "no impact on public interest journalists who vehemently protect their sources yet recognise and respect the rule of law". *Mahon Tribunal v Keena & anor* [2009] IESC 78

déposé le 12 juin 2013) with the intention of expanding and strengthening the protection of journalistic sources (Ministry of Justice 2013). At the time of writing, it had yet to be approved (Assemblée Nationale (a): 2013) (RSF 2014a, Damge & Cosnard 2015).

In June 2010, the Supreme Court of the Russian Federation issued a clarification regarding the Law on Mass Media, stating that in a case involving the disclosure of the source of information, courts should follow part 2 article 41 of the Law of the Russian Federation on mass media under which:

The editorial staff is obliged to keep the source of information a secret and has no right to name the person who has provided the information on condition of non-disclosure of his [sic] name, unless the court has demanded the opposite in connection with the case being tried. [...] During any stage of the deliberations the court has the right to demand corresponding editorial staff disclose the information on the source if all other means of finding the circumstances vital for the settlement of a case are exhausted, and the public interest in disclosure of the source of information outweighs the public interest in keeping it a secret (Supreme Court of the Russian Federation: 2010).

Portugal amended its Statute of Journalists (Journalist's Statute Law no. 01/99) in late 2007. Article 11 (1) states that: "Without prejudice to the provisions established in penal procedure law, journalists are not required to reveal their information sources, and their silence thereof is not liable to any direct or indirect sanction".

In September 2014, the Dutch parliament began considering two new Bills on the protection of journalistic sources, following judgments against the Netherlands over the European Convention on Human Rights and involving cases concerning journalists and source protection. The first Bill amends the Intelligence and Security Services Act 2002 to require a binding judicial review from the Court of The Hague before intelligence and security services are allowed to apply their special powers to journalists in order to uncover their sources. This proposal addresses the main issue in the ECtHR judgment against the Netherlands in the *Telegraaf Media* case (see Regional Instruments section of the study) (Breemen 2014). The Bills, which were still progressing through the Dutch parliament at the time of writing, were welcomed by the Dutch journalists' union (NUJ 2014).

At the time of writing, Switzerland's *Basler Zeitung* was awaiting a decision by the European Court of Human Rights regarding its appeal against a Federal Court decision involving a journalist asked to reveal the identity of a source. The Basel Court of Appeal had rejected the State Attorney's order that the journalist reveal the identity, however, on further appeal, the Federal Court found that the crime could not be solved without the journalist identifying the source. The court also indicated that an overriding interest in publication of the article did not exist because there was no evidence of political, economic or public administration impacts (International Law Office 2014b).

In Armenia in 2014, *Hraparak* newspaper and iLur.am (an online news publisher) appealed to the Republic's highest appeal court, the Court of Cassation, against a lower court order obliging them to reveal their confidential sources in an assault case. The court of First Instance and the Court of Appeal both ruled that the two media organisations should disclose the source of their reports, upholding the prosecution's case that the protection of public interest in the criminal process was stronger than the public interest in not disclosing the source (Sayadyan 2014).

In August 2012, a district court in the Czech Republic reversed fines imposed by police on the weekly newspaper *Respekt* for refusing to reveal the source of a document related to a corruption scandal. The court found that the information was not necessary to the police investigation (Freedom House 2013b).

Israel's Knesset in 2014 discussed the possibility of introducing measures to provide greater protection for journalists who obtain national security leaks from confidential sources (Freedom House 2014g). The proposed law had not been ratified at the time of writing.

The German parliament also passed a law as an amendment to the Criminal Code and Code of Criminal Procedure in 2012. This prohibited the prosecution of journalists for reporting classified information obtained from government informants as well as prohibited searches and confiscation of journalistic material and offices in connection to the same case (IRIS 2012).

In Greece, the protection of source confidentiality is mentioned only in the Code of Ethics for Journalists that was established in 1998 by the Journalists' Union of the Athens Daily Newspapers (ESIEA). Although source protection is not established in Greek law, ESIEA's code of Ethics (article 2) refers to the journalist's rights, duties and obligations. At paragraph i) it says "The journalist is competent and obliged: To adhere to professional discretion as to the source of information which has been obtained in confidence" (ETHICNET). The code had no legal status at the time of writing.

ii. North America

The two countries in North America: The United States of America and Canada both recorded notable developments in the arena of legal protections for journalists' sources in the period 2007-2015.

Countries demonstrating changes in North America: Two out of two (100%)

- United States of America
- Canada

a. National Security/Anti-terrorism impacts

In the USA, the Government pursued eight leak-related prosecutions between 2008-2015 on national security grounds (Savage 2014a). This involved confidential journalistic communications being subpoenaed in a number of cases, and the reaction ultimately leading to a revision of procedural rules in an attempt to better protect source confidentiality. Reference to national security issues was a factor in the case discussed below.

In 2013, it was revealed that US Government officials had subpoenaed the telephone records of Associated Press (AP) reporters for a two-month period during the preceding year (Sherman, 2013; Savage & Kaufman 2013). This occurred notwithstanding the Justice Department's own guidelines (28 C.F.R. § 50.10) (Reporters Committee for Freedom of the Press, 2013). AP Chief Executive Gary Pruitt stated that the records potentially revealed communications with confidential sources across all of the company's news gathering activities during a two-month period.

Also in 2013, *Der Spiegel* reported that the NSA had intercepted, read and analysed internal communications at Al Jazeera which had been encrypted by the news organisation (Der Spiegel 2013). The story was based on reported NSA documents leaked by Edward Snowden.

The New York Times journalist James Risen faced jail for refusing to reveal a source cited in his 2006 book *State of War* after he exhausted all legal options up until a failed Supreme Court review (*United States of America v Jeffrey Alexander Sterling; James Risen* US Court of Appeals for the Fourth Circuit, No 11 – 5028, July 19 2013) (Hillebrand 2012; Warren 2014). The US Justice Department later abandoned its bid to compel Risen to reveal the source in court after outgoing US Attorney Eric Holder said that no reporter who is doing her/his job would go to jail on his watch. In January 2015, the jury convicted the accused source without Risen's testimony, referring to phone records showing that the two were frequently in contact (*The Economist* 2015). The source was ultimately jailed for three and a half years (Editorial Board, *The New York Times* 2015).

Another journalist's confidential source was jailed in the US on espionage charges, after the FBI obtained a warrant to access Fox News reporter James Rosen's phone and email records (Case 1:10-mj-00291-AK US District Court 2010). According to court documents, FBI investigators also used the security-badge data of the source, in combination with phone records and e-mail exchanges with the journalist, to build a case. They targeted the movements of the source and the journalist a few hours before the story was published in June 2009 (Marimow 2013).

Investigators reportedly needed to access the journalist's emails because they suspected that the source had deleted some from his own accounts (Savage 2014a; Case 1:10-mj-00291-AK, US District Court 2010, 11 January 2011). The law circumvented by the search warrant that allowed investigators access to Rosen's emails is U.S. Code § 2000aa 'Searches and seizures by government officers and employees in connection with investigation or prosecution of criminal offenses'. It stipulates that: "it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication" unless the person is reasonably suspected of being directly involved in the crime to which the materials relate. (Legal Information Institute, date unknown).

In early 2015, after a period of negotiation with US media houses, their lawyers, and press freedom groups, and in response to strong criticism, the Government moved to address concerns about the undermining of source protection frameworks in the context of leak investigations. It signed into force new guidelines restricting access to journalists' phone records and digital data. (See discussion in section d below).

In January 2015, journalist Barrett Brown was jailed in the US for 63 months on charges that amounted to linking to material released in connection with the hacking of a private intelligence contractor (Woolf 2015). During the trial, the FBI obtained a warrant to access Brown's laptop, with the authority to seize any information related to the group Anonymous and others. This warrant permitted access to "email, email contacts, 'chat', instant messaging logs, photographs, and correspondence" (see also Ludlow 2013).

In Canada, the Security of Canada Information Sharing Act – anti-terrorism legislation known as Bill C-51 – was passed by the parliament in June 2015 (Therrien 2015). Canadian Law professors Craig Forcese and Kent Roach have also pointed to the likely chilling effect

of the Act on freedom of expression, including journalistic communications (Forcese & Roach 2015).

b. Mass Surveillance and targeted surveillance

Confidential documents leaked by Edward Snowden, first published by the US edition of the UK newspaper *The Guardian* on June 5 2013, reported that the US National Security Agency (NSA) monitored telecommunications metadata of citizens (Bauman et al 2014; Moore 2014). Another article in early 2015 reported that the NSA and GCHQ had hacked a company that makes phone SIM cards, which could compromise the security of millions of phones around the world (Scahill 2015).

On June 2nd 2015, the US Senate passed the USA Freedom Act. The Act, which supercedes the Patriot Act, ends the practice of bulk collection and storage of US citizens' metadata phone records by the NSA. It also places responsibility for storing citizens' data in the hands of private companies, mandates creation of a panel of public-interest advocates for the court that oversees surveillance programs (US Foreign Intelligence Surveillance Court, FISA) in cases that involve novel or significant legal issues, and requires the Court to notify Congress when it reinterprets law. Other surveillance powers, including email and Internet interception, remained unaffected (Siddiqui 2015, Ackerman 2015, Yuhas 2015).

In a case beginning in 2008, *The Nation Magazine* and the Pen America Centre joined an action against the head of the NSA and the US Attorney General in the District Court of New York (*Amnesty International et al V Clapper et al* 2008) alleging that their constitutional rights were being violated by electronic surveillance which undermined and obstructed their work with confidential sources. The case was dismissed because the plaintiffs could not prove that they had been subject to 'dragnet surveillance'. However, in May 2015 in the Second Circuit Court of Appeal found for the plaintiffs, declaring bulk collection of American's phone records illegal.

In 2013, US District Court Judge Richard J Leon ruled that the NSA's bulk surveillance and long-term of telephone calls violated the Fourth Amendment privacy-related protections against unreasonable searches and seizures (*Klayman v Obama Civil Act No. 13-0851(RJL)* December 1, 2013). The case was the subject of an appeal by the US Government at the time of writing.

Pro Publica and the American Civil Liberties Union have separately launched three legal challenges to secrecy surrounding NSA and Foreign Intelligence Surveillance Court processes regarding the authorisation of mass surveillance (Brandeisky 2013). The cases, all lodged in 2013, were still pending at the time of writing.

In March 2015, *The Nation Magazine*, Pen America, Wikimedia, *Amnesty International* USA, Human Rights Watch and others launched a joint action in the Maryland District Court, challenging the NSA's bulk interception and searching of Americans' Internet communications, including emails, web-browsing content, and search-engine histories (Wikimedia et al Vs NSA Case 1:15-cv-00662-RDB). (See further discussion of this case in the 'Entitlement to claim protection' section below).

In Canada in 2010, a court (see discussion re: R. v. National Post 2010 below) declared that mass surveillance undermines commitments that journalists make to protect sources (Best 2010).

c. Data retention/Third party intermediaries

The AP case cited above highlighted the issue of the retention of journalists' data, including data that may identify confidential sources, by third parties. Telecommunications carriers (phone, mobile and fixed-line broadband) companies and major Internet services are among these third parties, and US law enforcement and security officials have argued that there is no expectation of privacy for those records. The key case in this area is *Smith v. Maryland*, and it is under challenge by civil libertarians and others (*Smith v Maryland* 442 US 735 Supreme Court 1979).

The Risen case discussed earlier also shed light on the impact of data retention on reporters' dealings with confidential sources. He concluded that his travel records, credit data and phone records had been accessed (CBS 2015). Similarly, in the aforementioned Rosen case, the reporter's email correspondence and phone records were subpoenaed. There was a media outcry in response and Rosen was not prosecuted (*The Intercept* 2014).

Other cases of data retention and access took place with potential relevance to source protection. It emerged in early 2015 that Google had turned over data about Wikileaks and its staff to the US Government, under a secret search warrant that included instructions not to tell Wikileaks (Kravets 2015). The search company did not tell Wikileaks in a timely manner after it was released from the gag order. Ross La Jeunesse, Global Head of Free Expression and International Relations at Google, told the author that the company deals daily with thousands of requests for revelations and Google frequently pushes back against such requests "But we are under the law and we are forced to comply if it's been through due legal process" (Posetti 2015c).

In 2013, the US Government sought access to the encrypted email messages and metadata of a user of the Lavabit encrypted email service in the Eastern District Court of Virginia (*US V Lavabit*). The owner of Lavabit resisted, shut the company down and the case was under appeal in mid-2015 (Phillips M and Buchanan M 2013).

Several third party intermediaries, including Google, Microsoft, Facebook, LinkedIn and Yahoo successfully challenged a range of cases of US Government requests for their clients' data before US courts in 2013, enabling them to make limited revelations. (c.f. Brandeisky 2013). These judgements served to increase a degree of transparency around such requests.

In 2011 and 2013, the Electronic Frontier Foundation brought actions on behalf of two unnamed telecommunications companies who challenged the legitimacy of so-called National Security Letters. These US Federal Bureau of Investigation (FBI) 'letters' make it illegal to disclose information about US Government demands for citizens' phone records. A Federal judge ruled in favour of the plaintiff in one case on the grounds that the 'letters' were unconstitutional and ordered the FBI to stop producing them (US District Court 2013). However, he found against the plaintiff in the second case (US District Court 2013b) and the US Government was in the process of appealing the first decision at the time of writing.

d. Entitlement to Protection: Who is a journalist? What is journalism?

At the time of writing, the US was debating a proposed federal shield law in the Senate (*Free Flow of Information Act of 2013*). The definition of "journalist" under the Bill includes someone who was an "employee, independent contractor or agent of an entity or service"

who, among other things, “disseminates news or information by means of newspaper... news website, mobile application or other news or information service (whether distributed digitally or otherwise)” (*Free Flow of Information Act of 2013*, s11(1)(a)i)(I) ‘Covered journalist’). The section also defines journalism methods, such as “collecting interviews”. (*Free Flow of Information Act of 2013*, s11 (1)(a)i)(I) ‘Covered journalist’). The bill had not become law by the time of this Study’s conclusion in July 2015 and it is uncertain whether it would extend to bloggers doing journalism.

In some US states, such as California (Cf *O’Grady v. Superior Court*, 139 Cal. App.4th 1423), legislatures and courts have explicitly extended the protection to non-traditional journalists operating as online news producers.

Canadian courts have also discussed the issue in case law. The Canadian Supreme Court justices, referring to the precedent *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, stated that law enforcement would be weakened if source protection was not limited to the traditional media (*R. v. National Post*, 2010 SCC 16, [2010] 1 at para 40).

e. Other digital dimensions

In one reported case, police searched the home of a Journal de Montréal reporter, taking his computer (RSF 2012). This example is not provided with the presumption that confidential journalistic data was unduly exposed.

f. Anonymity issues

No additional developments were recorded during the research period.

g. Other dimensions

As indicated above, at the time of writing, the US was debating the introduction of a federal shield law. This was against the backdrop of fragmented and differing shield laws found at state level, which has highlighted a need for a consistent application of shield law protections at federal level for US journalists. According to the Reporters Committee For Freedom of the Press, 36 states plus the District of Columbia now have a journalists’ “privilege” (Ruane 2011) in their laws or rules (with Utah and New Mexico recognising the privilege through court-adopted rules). All of the other states — apart from Wyoming — have court decisions recognising some level of special protection (Leslie, 2008).

The disparity of state shield laws was illustrated when the accused in a court case attempted in 2013 to compel a New-York-based Fox News journalist to reveal her confidential source. However, an appeal court found that Jana Winter was protected under New York’s shield laws from revealing her source, and she was not subject to the weaker Colorado laws (*In the Matter of James Holmes v. Winter*, __ N.E.2d __, 2013 WL 6410422, 2013 N.Y. Slip Op. 08194 at 23, 25 (Dec. 10, 2013).)

As discussed earlier in this Study, the US Government has been criticised in connection with actions designed to discover journalists’ sources, in the course of leak investigations (Savage 2014b). In response to these concerns, the US Government embarked upon a series of high-level consultations with media industry representatives, advocates, academics and press freedom organisations. Following these consultations, the US Department of

Justice published the *Report on News Media Policies* in July 2013 which carried a preamble describing revisions designed to “strike the proper balance among several vital interests,” such as protecting national security and “safeguarding the essential role of the free press in fostering government accountability and an open society” and contained recommendations for renovating procedures (DOJ 2013). The recommendations included:

i. Reversing the Existing Presumption Regarding Advance Notice

This new rule requires authorities to notify news media in advance when access to their communications records is sought, in all but the most exceptional cases.

ii. Enhanced Approvals for Use of Search Warrants and Section 2703 (d) Orders

This rule limits the power to over-ride the journalistic materials seizure exception by stipulating that it can be circumvented only when the member of the news media is the subject of a criminal investigation for conduct not connected to ordinary newsgathering activities. Secondly, the rule requires applicants for search and seizure warrants pertaining to news media activities to establish that such access is essential and that permissions are narrowly framed to ensure that only material necessary for the investigation is targeted.

iii. Establishment of a News Media Review Committee

This Committee (comprised of experts within the Justice Department who are not involved in the cases under consideration) is established to advise the Attorney General when Departmental officers request: a) access to news media records in leak investigations; b) authority to access the reporting records of a member of the news media without prior notice; c) testimony from a member of the news media that would expose a confidential source.

iv. Centralisation of Review and Public Reporting Requirements

This provision is designed to enhance oversight and tracking of the outcome of DOJ requests for news media subpoenas.

v. Intelligence Community Certification

This certification process is designed to ensure that requests for access to news media records in the case of investigations connected to revelations of classified or national security-related information are proportionate.

vi. Safeguarding information

This clause promises a revision of the safeguards regarding proper use and handling of the communications records of members of the news media. It intends to ensure that records obtained are kept secure, while limiting access, usage and sharing of the data.

vii. Technical Revisions

With significance for this study, this point acknowledges the need to account for technological changes in newsgathering, distribution and publication. It extends the rules above to the records of news media members that are held by third party intermediaries.

viii. Written Guidance and Training Requirements

This point highlights the need to ensure that law enforcement officers and relevant Department officials are educated about the above changes and equipped to implement them.

ix. Establishment of a News Media Dialogue Group

The value of stakeholder engagement in regulating access to private news media communications is recognised here. The Group is described as having representatives from the news media, the DOJ and its Director of Public Affairs.

x. Intelligence Agency Administrative Remedies

This point provides guidelines for investigating leaks designed to internalise enquiries to limit impacts on the news media.

Following up on these recommendations, the USA's Attorney General signed off on a new set of Department of Justice guidelines in February 2014. Titled *Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting or Charging Members of the News Media*, the new rules (DOJ 2014) include the presumption that news media will receive advance notice from prosecutors when attempts are made to access their journalistic communications. They also further limit exceptions to a law forbidding search warrants for journalistic material unless they are suspected of criminal activity, stating that warrants cannot be invoked in the context of ordinary newsgathering activities. The new rules apply to criminal investigations, and exempt wiretap and search warrants obtained under the Foreign Intelligence Surveillance Act (FISA) as well as subpoenas used to obtain records about communications in terrorism and counter espionage investigations on national security grounds.

In Canada, in 2010, a reporter in possession of documents alleging the fraudulent conduct of a third party successfully had search warrants set aside, after he claimed that he obtained them from a confidential source (*R. v. National Post*, 2010 SCC 16, [2010] 1). However, the Canadian Supreme Court rejected the reporter's claim to a constitutional right to shield the identity of sources during criminal investigations, instead favouring deciding the issues on a case-by-case basis. In considering the appeal, the Court relied on the Wigmore Criteria to determine that the journalist in the case could not claim a right to source protection (2010 SCC 16). John Henry Wigmore was an expert on evidence law (Best 2010) who developed these criteria in his influential "Treatise on the Anglo-American System of Evidence in Trials at Common Law" (Wigmore 1923). Wigmore suggested that confidentiality would be upheld if the following criteria were met:

1. The communication originates in a confidence that it will not be disclosed...;
2. The confidence must be essential to the relationship in which the communication arises;
3. The relationship must be one which should be "sedulously²¹ fostered" in the public good. And (if all of the criteria 1-3 have been satisfied) then;

21 ("Sedulous[ly]" being defined in the New Shorter Oxford English Dictionary on Historical Principles (6th ed. 2007), vol. 2, at p. 2755, as "diligent[ly] . . . deliberately and consciously". *R. v. National Post* [2010] 1 SCR 477, at para [53])

4. The court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth

The judges concluded by majority opinion that:

The bottom line is that no journalist can give a source a total assurance of confidentiality. All such arrangements necessarily carry an element of risk that the source's identity will eventually be revealed. In the end, the extent of the risk will only become apparent when all the circumstances in existence at the time the claim for privilege is asserted are known and can be weighed up in the balance. What this means, amongst other things, is that a source who uses anonymity to put information into the public domain maliciously may not in the end avoid a measure of accountability (2010 SCC 16: 69)

Also in Canada, in 2012 three cases emerged involving attempts to compel journalists to reveal their sources or the use of search warrants to discover them. In the first case, a Quebec judge ordered a journalist from the news website MediaSud to reveal his sources for a story on the leak of a confidential report to another journalist. In the second case, a Quebec court ruled against an attempt by a real estate developer to get a Radio-Canada reporter to reveal his source.

Regional Conclusion

25 out of 38 (66%) of countries examined in the UNESCO region of Europe and North America experienced significant developments pertaining to source protection laws in the period 2007-2015. These changes reflected the key themes identified in this report associated with emerging digital effects on legal source protection frameworks: a) national security/anti-terrorism impacts; b) Surveillance; c) Data retention/handover and the role of third party intermediaries; d) Questions about entitlement to claim source protection; e) Increased risk of source exposure due to digitally stored journalistic communications being seized during investigations.

6.5. Latin America and The Caribbean

The recognition of protection of journalistic sources is generally respected in Latin America both at the regional and local levels. Most countries have adopted constitutional or legal protections which give a strong level of legal protection. ...There are also important declarations from the Organization of American States. Few journalists have been forced to reveal their sources by courts, however direct demands for sources still occur regularly in many countries, requiring journalists to seek legal recourse in courts. There are also problems with searches of newsrooms and journalists' homes, surveillance and the use of national security laws. (Banisar, 2007: 81)

Between 2007-2015, a number of developments in Latin America have had an actual or potential bearing on source protection, including mass surveillance, national security legislation, searches of newsrooms and journalists' homes, and physical threats.

At the individual States level, developments in regard to source protection coverage 2007-2015 were identified in 17 of the 20 countries (85%) examined in Latin America and the Caribbean – all of these countries are in Latin America:

- Argentina
- Bolivia
- Brazil
- Chile
- Colombia
- Costa Rica
- Dominican Republic
- Ecuador
- El Salvador
- Guatemala
- Honduras
- Mexico
- Panama
- Paraguay
- Peru
- Uruguay
- Venezuela (Bolivarian Republic of)

According to the Editor-in-Chief of Argentina's *La Nacion*, Carlos Guyot, who spoke to this study's research team, in Latin America the laws are strong in many settings but enforcement is weak (Guyot 2015). In addition, while many countries have laws in place to protect journalists' sources, it is increasingly evident that sources can be identified by other means such as intercepts, threats, searches, accessing stored data, and biometrics. These factors, along with the classification and restriction of information in the name of national security, have relevance to whether protections for journalists' sources are substantively effective.

Surveillance was a theme in ten of the countries studied, five of which (Bolivia, Ecuador, Colombia, Paraguay, Mexico) introduced new laws that allow data retention and/or interception during the period examined. Four countries (Peru, Honduras, Panama, Costa Rica) have proposed variations to state secret laws or information classification laws which, in some cases, allow for prison sentences, for revealing such information. Three countries in the region introduced new source protection dispensations, including the one enshrined in the 2010 Constitution of the Dominican Republic.

a. National Security/Anti-terrorism impacts

Overly broad regulations instituted in the name of national security and anti-terrorism measures may be seen to pose a risk to journalistic source protection in parts of Latin America.

Peru's Decree No. 1129 classifies all information related to national security and defence as a state secret (Article 12). It imposes a punishment of up to 15 years in prison for those who reveal such information. According to the Inter American Press Association (IAPA 2013), the Decree states that: "any person who by reason of his or her position or function, becomes aware of classified information of a secret, reserved, or confidential nature, related to Security and National Defence, is obliged to keep the corresponding secrecy". The Computer Crimes Law enacted in 2013 penalizes the release of classified or secret information that compromises national defence security with five to 10 years in prison (Khan, 2013). In February 2013, the Ombudsman's Office of Peru filed an action of unconstitutionality against Article 12 of the Decree, arguing that it violated the right to access public information because: "The article establishes the secret nature of all documentation or information regarding matters referring to national security and defense, along with the obligation of every person to maintain secret all information on such matters in their possession" (Botero 2013; IPYS/IFEX 2012; OSF 2014c). The outcome of this action was unknown by mid-2015 when the research for this study was concluded.

In January 2014, the Honduran parliament approved the Official Secrets Law, which was then suspended pending further study. The law gives state entities the power to classify information from "restricted" to "ultra-secret". In Article 13, those with access to classified information are warned that revealing it leads to sanctions (Griffen 2014).

El Salvador's Public Access to Information Law (LAIP), first passed in 2010, also includes a classification of information as military secrets and data compromising national security. The classification allows for formal punishments for accessing or revealing such information, even if it is in the public interest (Bachmann 2010). Also in 2010, the Legislative Assembly introduced a motion to subject staffers to a polygraph test in order to identify an individual who had leaked information to the media concerning salaries for legislators. However, this initiative was withdrawn due to public opposition (Freedom House 2011c).

Venezuela saw the introduction of the Strategic Centre of Security and Protection of the Homeland (Decree CESPPA), which has a wide mandate to monitor all online communications (El Nacional, 2014).

In Panama, an Information Security Bill, which would have imposed prison sentences for those who gained access to classified information and publicised it (Article 429) was withdrawn in 2012 (Higuera 2012, Simmons 2012).

In Costa Rica, the government announced that the Cybercrime Offense Law 9048 2012 - which imposes one to six years in prison for revealing state secrets related to national security, defence of sovereignty and foreign relations - would not apply to journalists (RSF 2013a, RSF/IFEX, 2012). In April 2013, the National Assembly revised the legislation and eliminated Article 288 which would have imposed a prison sentence with up to 10 years in jail for releasing "state secrets". The revisions also removed prison terms in the case of protected information released in the public interest (Freedom House 2014h)

b. Mass Surveillance and targeted surveillance

In Columbia, *La Semana* magazine revealed that the Colombia Administrative Department (DAS) reportedly conducted illegal surveillance over six years, including on the telephones and emails of journalists, NGO workers, supreme court justices, politicians and government critics from 2007-2009 (Soendergaard, 2014). After the dismantling of the DAS, the former head of the Department, Maria del Pilar Hurtado, was convicted of illegally spying on human rights activists, journalists, politicians and judges. She was sentenced to 14 years jail in May 2015. In the same case, the high court also sentenced Bernardo Moreno, a former senior official, to eight years under house arrest after he faced charges including unlawful violation of communications (*Latin American Herald Tribune* 2015, Botero 2015).

In 2014, Colombian military intelligence reportedly intercepted around 2,600 emails between Revolutionary Armed Forces of Colombia (FARC) spokespeople and international journalists during peace negotiations (Cruz 2014, AP 2014, *Panam Post* 2014). Colombia-based Foundation for Freedom of the Press (FLIP) official Pedro Vaca Villareal told this study's researchers that surveillance in Colombia is founded on the Law of Intelligence (Law 1621 of 2013) and the Law of Public Security (Law 1453 of 2011). These allow the monitoring of the electromagnetic spectrum and access to subscriber data from telephone companies.

In 2009, Peru's former President Alberto Fujimori was sentenced to six years in prison for the wiretapping of journalists, politicians and businessmen during his term (Lauría 2010). The following year, a former naval intelligence employee was revealed to have reportedly intercepted 52,947 emails of journalists and political opponents during the Fujimori government (Rodriguez, 2011).

In 2011, it was revealed that Peru's Congress had reportedly covertly investigated telephone calls made by a group of journalists who had alleged corruption by government officials (Cruz 2011). In the aftermath of a court case, the Supreme Court of Peru proposed prison sentences for those who publish private communications obtained by illegal wiretapping (Medel 2011 b; Peru21, 2011). Also in Peru, a journalist who specialised in reporting drug trafficking and terrorism was interrogated about his sources, based on wiretaps used by intelligence units against terrorist groups, the Inter-American Commission of Human Rights reported in 2013 (Botero 2013).

Concerning Brazil, the Director of the Institute for Technology and Society of Rio De Janeiro, Professor Ronaldo Lemos told this study that large companies and the Brazilian Presidency had been the targets of surveillance programs. "Accordingly, journalists working with sources connected with these institutions might have been collaterally affected," he said (Lemos 2015). According to World Editors Forum Chairperson, and Executive Director of Journalism at Grupo RBS, Marcelo Rech, targeted surveillance connected to police investigations into organised crime and corruption is a problem for journalists dealing with confidential sources in Brazil. Rech identified a case in November 2014, in which a prosecutor asked that a judge waive the confidentiality of the telephone lines and the mobile lines of the newspaper *Diário da Região*, in order to identify the source of a story about corruption. The judge issued the order but the newspaper and the national Brazilian newspaper association asked for the Supreme Court to suspend the order. In January 2015 the Court suspended the order on the basis of its unconstitutionality (Rech 2015).

The Supreme Court of Costa Rica ruled in 2014 that government surveillance of phone records of *Diario Extra* journalist, Manuel Estrada, was unconstitutional (IPI 2014a). The court found that the surveillance violated the privacy of the reporter and it ordered the

investigative agency to destroy all recordings pertaining to the investigation, while prohibiting any government agency from carrying out this type of operation in the future. The judge also criticised the prosecutor's office for authorising the operation (IPI 2014a).

New Laws Permitting Interception

In Bolivia, the 2011 *Telecommunications, Information Technology and Communication Law* permits telecommunications interception in cases of danger to state security, external threat, and internal shock or disaster (Article 111). Under this law, telecommunication providers are obliged to cooperate with authorities when asked to provide information (Lara 2011).

In Ecuador, Article 14 of the 2012 *Telecommunication Service Subscribers and Added Value Registration Act* prohibits third party interception of communications, however, Article 29.9 of the same resolution allows the regulator CONATEL to track IP addresses from ISP customers without judicial order (Freedom House 2013d). A similar clause appears in the Peruvian Computer Crimes law that also allows police to access users' personal information without a court order.

c. Data retention/Third party intermediaries

Article 1 of Colombia's *Decree 1704* of 2012 on communications interception and data retention states: "The interception of communications, regardless of the origin or underlying technology, is a public security mechanism that seeks to optimize the investigation of crimes that is conducted by competent authorities and agencies, within the framework of the Constitution and the Law" (EFF 2012). Decree 1704 also compels Telecommunication Service Providers including ISPs to implement technological means and infrastructure that accommodate access to the networks by judicial police (EFF 2012).

Further, Article 4 requires that communications providers must retain and store subscribers' personal information for five years. Once the relevant legal requirements have been met, telecommunications network and service providers must deliver to the authorities the subscriber's data such as identity, invoicing address and type of connection.

Signed into law in 2014, Mexico's *Broadcasting and Telecommunications Act* requires providers to store data from clients in Mexico and grants national security agencies and police access to this data in the name of national security (IPI 2014c). Article 190 states an obligation to retain data for 24 months (Ley de Telecomunicaciones y Radiodifusión 2014). Former Special Rapporteur on Freedom of Expression at the Inter-American Commission on Human Rights Catalina Botero reported to this study's researchers that the law covers metadata and geolocation information, and that it allows the authorities to access the data without a court order.

Article 474 of Ecuador's 2013 *Organic Penal Code* requires that ISPs store user data in order for the state to carry out corresponding investigations (Lavin & Betancourt 2013).

Paraguay's 2014 Data Retention Bill obliges service providers and hosting service providers to store data for a minimum of six months (Lexology 2014).

Argentina's proposed data retention law (National Telecommunications Law of 2003 Amendment) was ruled unconstitutional in 2009. It would have required all telecommunications companies to store data for 10 years (EFF 2009).

In Brazil, the Internet Bill of Rights' sections on privacy and data retention (Articles 13 and 15) require Internet access providers and Internet service providers to retain data for one year and six months, respectively. Regulation of such provisions was still pending at the time of writing (Law No. 12.965 of 23 April 2014).

d. Entitlement to protection: Who is a journalist/What is journalism?

The issue of entitlement to claim source confidentiality privileges was raised in 2014, when the Supreme Court of Costa Rica ruled on government surveillance of *Diario Extra* journalist, Manuel Estrada (noted above). Presiding Judge Ernesto Jinesta Lobo also referred to people who regularly contribute to reporting or public opinion as a category outside traditionally defined reporters to whom protection from surveillance applies (IPI 2014b).

Legislative changes regarding the definition of 'professional journalists' in the Ecuador Communications Act attracted the concern of the Inter-American Commission on Human Rights' Annual Report in 2013. The Act establishes that only professional journalists and media workers may perform journalistic activities of the media, at any level or position. Exceptions are made for those who have specialized knowledge, or opinion-based programs and columns, and those who perform journalistic activities in the languages of the Indigenous peoples and nations (Art. 42) (Botero 2013: 148).

Mexico City (a federal entity within Mexico) has the *Professional Secrets of Journalists Law* which defines "journalists" as "Individuals as well as media and public dissemination, community, private, independent, college, experimental" and extends to "or any other whose job is to collect, generate, process, edit, comment, review, disseminate, publish or provide information through any media and communication that can be print, radio, digital, or image, permanently, with or without compensation and without professional qualification or registration required" (Article 1).

The 'Who is a journalist?/What is journalism?' issue has also been debated in the Dominican Republic, where a proposed law would criminalise the practice of journalism without a journalism degree from an accredited school of journalism or communications. Punishment would include up to two years in jail and a US\$25,000 fine (Lara 2012c). In 2012 the university degree requirement for journalists also existed in Bolivia, Cuba, Chile, Honduras and Nicaragua.

In 2009, the Brazilian Supreme Court ruled that a journalism degree was not mandatory for the exercise of journalism in that country (Supremo Tribunal Federal, 2009).

e. Anonymity issues

The Brazilian Constitution states that "access to information is ensured to everyone and the confidentiality of the source shall be safeguarded, whenever necessary to the professional activity". Anonymity is forbidden in all other circumstances. This provision has recently been interpreted by courts and Public Prosecutors (Ministério Público) as a means to ban apps and software that provide anonymity on the Internet. Such case law is still recent (Nelson, Mashable 2014), but if confirmed over time, it could lead to restrictions on the availability of relevant tools for journalists to communicate with anonymous sources.

f. Other digital developments

Chile passed a Net Neutrality law prohibiting ISPs to arbitrarily block, interfere, discriminate, hinder or restrict legal content that users send, receive or provide via the Internet (Ley 20453 2010; Ruiz 2010).

g. Other dimensions

Since Mexico's introduction of a federal shield law in 2006 (Banisar 2007:83), three states have introduced protection for journalists' sources. As signalled above, Mexico City has the *Professional Secrets of Journalists Law* which states in Article 1 that journalists are entitled to keep secret the identity of sources who have provided information (Noticeros Televisa 2014). Additionally, another shield law has been passed in Chihuahua (Medel, 2011), while a bill was introduced in Coahuila (Harlow, 2010).

In Ecuador, the new Organic Communications Law (2013) guarantees the right of journalists not to go against their beliefs, to protect their sources, and their right to professional confidentiality (RSF 2013b, Martínez 2013).

The Dominican Republic, which previously had no laws for source protection (Banisar 2007: 85), introduced a new constitution in 2010, including two clauses acknowledging the protection of confidential sources:

Article 70: Habeas data: Every person has the right to a judicial action to know of the existence and to access the data corresponding to them that is found in registries or public or private data banks and, if case of falsehood or discrimination, to require its suspension, rectification, updating and confidentiality, in accordance with the law. The secrecy of the sources of journalistic information cannot be affected.

Article 49: Freedom of expression and information: The professional secret and the clause of conscience of the journalist are protected by the Constitution and the law (Constitute Project 2010)

In Brazil, the renovation of freedom of expression-related legal frameworks has resulted in significant impacts on the activities of journalists and the protection of sources. The Press Law from 1967 was revoked in 2009, but in the process so was this provision: "No journalist or radio commentator nor, in general, any person mentioned in Article 25 shall be compelled or required to give the name of his informant or news source, and his silence in this regard may not make him liable directly or indirectly to any kind of punishment" (Article 71).

In Argentina in 2014, police searched the radio station La Brújula 24 under a court order with the aim of pursuing the identity of the source who leaked government wiretap recordings to the station (CPJ 2014a). The case was still under investigation at time of writing.

In the Dominican Republic in 2012, investigative reporter Nuria Piera published a story titled *The Route to Millions* (Investigacion Periodistica 2012) in which she wrote about political funding. Piera reported that state intelligence officers searched her home and office in pursuit of her story's sources (Lara 2012a; Free Media 2012)

In Panama in 2013, the Attorney General's Office announced the intention to carry out inspections and gain access to journalists' equipment at newspapers *La Estrella* and *El Siglo* with the intention to discover the source/s of journalists' reports. However, the Attorney

General's office withdrew approval to search the two newsrooms on the basis of Article 21 of the Law of Journalism which states: "Journalists shall not be required to reveal sources of information and origins of news, without prejudice of other liabilities they may incur". The Declaration of Chapultepec was also cited (see earlier discussion about the Declaration in Section 6.2) (IAPA 2013).

A noteworthy court ruling in terms of source protection occurred in Bolivia in 2014, where *La Razón's* Ricardo Aguilar and Claudia Benavente were accused of revealing state secrets (Knight Centre 2014). A court ordered Aguilar to reveal his sources but he told this study that he had promised his source that he would never reveal their identity and therefore he refused to do so (Aguilar 2014). Ultimately, a La Paz court ruled that the case against Aguilar and Benavente should be heard by a press court, not a criminal court. However, at the time of writing, the case had still not been before the press court.

In a landmark ruling in 2009, the Constitutional Court of Colombia protected the right to confidential sources in judgment T-298/09, in a case involving *el Diario del Huila* where a politician tried to uncover the source of a story. The Court denied the claims, upholding the inviolability of professional privilege. It also quoted verbatim Principle 8 of the Declaration of Principles, according to which: "confidentiality is an essential element in the undertaking of journalistic work and in the role conferred upon journalism by society to report on matters of public interest" (Botero, 2012: 197).

In Uruguay in 2014, a judge asked journalist Roger Rodríguez to identify his source of information regarding a case of human rights violations (*El Espectador* 2014). Rodríguez refused, and the judge did not press the issue (IAPA 2014). The same year, a Mercedes court called five journalists from the Agesor news agency to testify in a case of alleged sexual abuse at a military encampment in 2013. They were asked to reveal their sources, however they also refused (IAPA 2014).

In Guatemala in 2013, *La Hora* reported that a journalist was summoned to reveal her source before the International Commission Against Impunity in Guatemala (CICIG) and the Public Prosecutors Office, in order to discover the source of a leaked confidential report on conditions within Guatemalan prisons (Lara, 2013a).

In Peru in 2013, the Attorney General called for a journalist from *La Región* to reveal the source of his report regarding a police action (Higuera 2013).

According to information received by the Inter-American Commission on Human Rights, in 2013 in the Argentinean state of Zulía, the Scientific Criminal and Forensic Investigation Corps (CICPC) subpoenaed and interrogated a journalist with the newspaper *La Verdad* and correspondent with the organization IPYS Venezuela (La Verdad 2013; Lara 2013b, Botero 2013)

Also in Argentina, in 2011 a judge subpoenaed six newspapers for the names and office contact details of all reporters and editors who had covered Argentina's economy over the previous five years, in order to call them as witnesses in cases against their sources (AP 2011).

In Mexico, journalist Juan Carlos Flores Haro said he was held at the municipal building in San Blas and interrogated for an hour to reveal his source (Lara 2012b).

Regional conclusion

Since 2007, there have been developments in Latin America with relevance to legal source protection frameworks. These have occurred in the context of both traditional contests over the protection of confidentiality of journalistic sources, and the digital revolution which has seen an accumulation of challenges - in the form of mass surveillance and targeted interception, data retention, national security and anti-terrorism measures that can impact on legal source protection. Additionally, questions have centred on which journalistic actors are entitled to claim coverage under source protection laws. Journalists in the region also face the conundrum that while there has been significant progress in legislation and judicial precedents, these do not necessarily translate as tangible protections.

7. Thematic Studies

Three thematic studies were identified in the course of research for this Study to allow in-depth analysis of key issues. The thematic studies featured in this section are:

- a. The impact of source protection erosion in the digital era on the practice of investigative journalism globally
- b. Sweden: How a State with one of the oldest and constitutional legal source protection frameworks is responding and adapting to emerging digital transformation and associated threats
- c. Model assessment tool for international legal source protection frameworks

Thematic Study 1:

The impact of source protection erosion in the digital era on the practice of investigative journalism globally

This thematic study examines the practical difficulties being confronted by investigative journalists with regard to source protection in the digital age, and the significant ways in which they are changing their practices in response (C.f HRW 2014).

For this case study, qualitative research interviews were conducted with 27 investigative journalists, editors, legal experts, and freedom of expression specialists drawn from 17 countries, reflecting the UNESCO groupings of Africa, the Arab States, Asia and the Pacific, Europe and North America, and Latin America. The interviews were conducted between November 2014 and February 2015 - face-to-face, by phone, Skype and email. The quotations below are not intended to represent a scientific sample of a wider set of views, but have instead been extrapolated for the purpose of signalling the more general issues at stake. Unless otherwise indicated, the individuals cited below were interviewed as part of the research for this study.

Research context

Two recent studies have indicated the significant impact of source protection erosion on investigative journalism practices in at least one part of the world:

In February 2015, the Pew Research Center released the results of a survey on “Perceptions of vulnerability and changes in behaviour” among members of the USA-based organisation Investigative Reporters and Editors (Holcomb, Mitchell & Page 2015). Pew’s research found that 64% of investigative journalists surveyed believed that the US Government collected data about their communications. The figure rose to 71% among national political reporters and those who report foreign affairs and national security issues. Ninety percent of the of US investigative journalists who responded to the Pew survey believed that their ISP would routinely share their data with the NSA, while more than 70% reported that they had little confidence in ISPs’ ability to protect their data.

As a result, 49% of respondents said that over the previous year they had changed the way they stored and shared sensitive documents. Twenty-nine percent said that they had changed the way that they communicated with journalists and other editors. (See further discussion of this research under the headings ‘surveillance’ and ‘third party intermediaries’

below, and separate research on the theme conducted for this study which is presented in Thematic Study 3).

Another study for USA-based Human Rights Watch interviewed 46 senior national security journalists from major USA news organisations, revealing the steps being taken to keep communications, sources and other confidential information secure in light of surveillance revelations (HRW 2014a: 30).

That study concluded that in the USA the combination of increased surveillance and government prosecution of leaks was having a big effect on the news gathering practices of national security reporters and their news organisations. It found that: "Journalists are struggling harder than ever before to protect their sources, and sources are more reluctant to speak. This environment makes reporting both slower and less fruitful" (HRW 2014a: 22).

The Pew study found that 45% of respondents ranked surveillance as the number one or number two challenge facing journalists (Holcomb, Mitchell & Page 2015). Nearly half of the national security, political and foreign affairs reporters among them also reported that concerns about surveillance have caused them to change the ways in which they communicated with sources (with reverting to face-to-face meetings being the main means of protecting sources). Meanwhile, 18 percent of this group reported that it was becoming harder to get sources to speak "off record".

Balancing the benefits and threats of technological change for investigative journalism in the context of source protection

a. Opportunities and threats

"Technology is allowing information to be leaked on a vast scale, a scale that couldn't possibly have been imagined...for me as a journalist we're in boom times, because you're able to get information that's incredibly detailed and you're able to get stories that you couldn't possibly [get before]"; Director of the International Consortium of Investigative Journalists (ICIJ) Gerard Ryle said, declaring the digital era a "Golden Age for journalism".

Founder of the Arabic Media Internet Network, Daoud Kuttub, echoed Ryle's view of the digital era:

On the one hand I think it has accelerated and widened the amount of data available to everyone and made it very easy to transfer information and documents. But at the same time governments are able to invade your privacy much easier and get information. (Daoud 2015)

Editor-in-Chief of Argentina's *La Nacion*, Carlos Guyot, also acknowledged the significant benefits of digital era investigative reporting involving confidential sources, including access to leaked documents that would have been impossible to get even five or ten years ago, although he added a caveat:

New technologies bring new challenges with them, but also new opportunities, like encrypted conversations via new software, although this must be combined with old fashioned practices...There is nothing like a face to face meeting with a source. ...Our main investigative reporter drove for three hours to a different city for a 15 minutes conversation with a source and drove back to our newsroom. If we are willing to endure the challenges, we can still do good journalism. (Guyot 2015)

b. Confidence of investigative journalists in legal source protection in 2015

Bolivian investigative journalist Ricardo Aguilar expressed serious concern about the reliability of legal source protection in the digital era. "...Mass surveillance, data retention and the appeal of the 'National Security' category leaves the protection of secret sources in latent vulnerability," he said.

ICIJ's Ryle said: "As a general rule these days, much more than in the past, it's very difficult to protect sources because of the fact that electronic communications can be back-tracked and people can be found much easier than they may have been found in the past..."

Executive Editor of the *Washington Post*, Martin Baron, told this study that concern about surveillance of newspapers' internal communications led to significant changes to newsroom practices during *The Post's* coverage of the Snowden story: "I didn't expect that we would have to be communicating with each other in an encrypted fashion and yet on many occasions we did just that. And on many occasions when we had meetings everybody turned off their cellphone, or left their cell phones behind..." (Baron 2015).

Director of the investigative unit at Sweden's national public radio (SR), Fredrik Laurin, was concerned about the risk of police seizing digital content due to gaps in source protection legislation in his country, and he described undertaking extraordinary digital security measures to comply with Sweden's strict laws requiring journalists to protect their sources (see Case Study 2).

But Marites Danguilan-Vitug, a co-founder of the Philippines Centre for Investigative Journalism, was more optimistic about source security. "My colleagues and I have not yet reached the stage when we're insecure about using confidential sources. Trust is still the biggest factor in keeping our confidential sources".

c. Chilling effect on sources

Co-founder of Pakistan's Centre for Investigative Reporting, Umar Cheema told researchers that the threat of surveillance is having a major chilling effect on sources. "Certainly, source insecurity is a major challenge and it is mostly [connected] with the stories about national security and high-profile government figures. It is hindering information," he said. Cheema said he believed that his status guaranteed that he is under surveillance and that his sources know it. He said that some sources approached him in the belief that he is the right person to be taken into confidence, while others hesitated because they feared that he was under surveillance and that "any contact with me will put them on radar screen".

Former Editor-in-Chief of *The Guardian*, Alan Rusbridger, told this study that the increased risk of exposure is having a direct impact on the willingness of confidential sources to share information with journalists. It had led to "a massive drying up of people willing to take the risk of talking to news organisations," he said.

ICIJ's Ryle said there is certainly increasing awareness among his sources that the stakes are much higher in the age of surveillance: "People are increasingly nervous because the truth is it's quite easy to trace people and to trace sources". International Editor of Algeria's *El Watan* newspaper, Zine Cherfaoui, said that sources are more reluctant to speak and increasingly require face-to-face meetings. "To really discuss with people we prefer to avoid electronic means or social networks. The Snowden Affair turned upside down the work of journalists... It's harder to speak to people. We really have to go out and meet them. It's face to face".

In Bolivia, *La Razon's* Ricardo Aguilar reported that sources have adjusted their behaviour, having "...intensified precautions ranging from avoiding using the phone to talk to me to not exchanging any form of correspondence, or digital messaging". However he said that there is no evidence that his sources are more reluctant to provide information. "In that sense, it seems that in the cases where I've had the opportunity to work with confidential sources, the digital age has nothing to do with the "chilling effect" because it existed by itself beyond the control of the Internet".

d. Chilling effect on journalism

The cost of digital security technology, training and legal fees in relation to digital issues is having a chilling effect on investigative journalism in some cases. Alan Rusbridger said *The Guardian* spent about a million pounds more a year on legal fees than they did five years ago, which reduces the budget to do reporting. This covered companies wanting the return of documents, who cited data protection laws and privacy, "so the bills on these things just mount and mount and mount and mount, so you can easily be spending tens or hundreds, hundreds of thousands of pounds trying to get a story into the paper," he said. "And of course once you get onto secure reporting there is a significant cost in equipment, in software, in training - particularly in trying to create a safe environment where we feel we can offer our sources the kind of protection that they deserve".

Some journalists feel they need to erase archival material to avoid it being seized. UK QC and Chair of the Centre for Investigative Journalism at Goldsmith's University, Gavin Millar, said journalists have destroyed unused content (such as un-aired interview footage) because of concerns about needing to protect their sources. He referred to the alternative being high legal costs for formally attempting to prevent the authorities from accessing un-broadcast content, for example.

Rusbridger said that communicating with sources is certainly harder now. "I think reporting just becomes much more difficult, it's much more difficult to talk to police people". He said it was also more difficult, if not impossible, to speak to municipal officials who believed their telephone lines were bugged. "All kinds of reporting are becoming much more difficult and more expensive...and time consuming".

However, in some cases, the biggest chilling effect on investigative journalism based on confidential sources is often not digital exposure of sources, but fear of subsequent consequences such as prison and death. Executive Director of the Arab Reporters for Investigative Journalism (ARIJ) Rana Sabbagh said that ARIJ has compiled 255 investigative reports over the past seven years, in many countries:

Not once were we asked to reveal a source... We are extremely careful and most of our stories so far haven't been the "sexy" investigations on high power or corruption. Our journalists don't have the tools to conduct such investigations, and working on these stories will either get them killed or jailed, and I don't think it's a risk worth taking. ... That doesn't mean we haven't pursued big political investigations but we do a risk assessment as part of our manual and code of ethics.

e. **Changing practices**

i. **Journalists assume they are being watched**

"I'm more careful with any digital platform that I'm involved in – whether it's email, phone or any other digital format. I assume that [I am] probably being watched, listened to, or read. That's my starting point and I take it from there," Jordan's Daoud Kuttub told this study. ICIJ's Gerard Ryle reported that he worked under a similar assumption, and accordingly advised colleagues against putting things in writing or emailing if they did not want them to come out afterwards.

Privacy International's Tomaso Falchetta highlighted the hidden nature of some digital acts that can impact on journalists working with confidential sources: "Of significant concern is the fact that digital communication surveillance - sometimes by the use of malware on the target's computer - is usually being conducted in secret so the journalist is not aware of the intrusion and cannot challenge or limit it".

Pedro Vaca Villareal, Executive Director of Colombia's Foundation for Freedom of the Press (FLIP), told this study that investigative reporting practices have already changed in his region in response to the challenges posed by digital surveillance and other factors undermining source protection.

According to Deputy Director of the Tow Centre for Digital Journalism, Susan McGregor, a change of practice in managing digital communications is required in response – at both the personal and professional levels.

It means that we have to be thoughtful about our devices and our communications in the way that most of us aren't accustomed to doing yet... Some of the habits we've developed... taking our phone everywhere, always having Wi-Fi on, emailing everything, we're just going to have to think differently about those things when it comes to work with sources. Chances are we'll also think differently about them in our personal lives, rather than trying to juggle two frameworks of communication.

Sweden's Fredrik Laurin stated: "Anytime there is any chance of the government being interested in what we do, during our research or after publication, I go to great lengths to protect my information. That means applying the strongest encryption I can find, the best methods, throwaway phones, you name it we try to do it." (op cit 2015).

US media lawyer Charles Tobin said that there was a growing involvement of legal counsel in the story production process due to source protection issues:

...It's just becoming more and more acute because you have seen more journalists' subpoenaed over the last 10 years than you did over the prior 50 years, and so it's becoming more of the subject of conversation when journalists call for advice. ...You look at issues not only of defamation and the lawfulness of the news gathering, but you also have to have a conversation about protecting the sources and how rigorous that needs to be done depending on the journalist's relationship and promises to the source.

ii. **Going back to analogue methods**

Bolivia's Ricardo Aguilar from *La Razon* believes that mass surveillance has significantly weakened source protection laws. "The response from journalism should be to make mass surveillance useless, taking excessive precautions when working with secret sources on

issues that affect large economic interest, or persons of economic and political power". (Aguilar 2014)

Alan Rusbridger has questioned if investigative journalism based on confidential sources is possible in the digital age, unless journalists go back to what he calls 'basics': "I know investigative journalism happened before the invention of the phone, so I think maybe literally we're going back to that age, when the only safe thing is face-to-face contact, brown envelopes, meetings in parks or whatever," he said.

Catalina Botero, former Special Rapporteur on Freedom of Expression with the Organisation of American States, advised going back to what she called 'the classics' of journalism practice. "Go to the corner, to a coffee shop, and talk to them. This is like a very huge contradiction because you have these great tools, wonderful tools to do journalism all around the world without moving from your house. But at the same time, you need to ensure that no one else is hearing".

That's the practice being adopted by the lead investigative reporter at Argentina's *La Nacion*, according to the paper's Editor-in-Chief Carlos Guyot: "[He] is now having more conversations face to face than ever before because the vast majority of his sources refuse to talk to him on the phone. Or, at least, he has to agree on new ways to communicate with them - actually, the old fashioned way: using public booths".

UK QC Gavin Millar, who represents several freelance journalists, said that some have a contract phone which they throw into the Thames River at the end of each week. They meet sources in pubs, write notes, and hide the notebooks in distant places in case their houses are searched by police.

Bolivia's Aguilar avoids using digital communication in order to protect his sources.

He said extreme distrust is the only defence against the possibility of confidential sources being exposed through the clandestine interception of email and social networks.

Algerian newspaper editor Zine Cherfaoui said journalists in the Middle East and North Africa, in particular, have become very cautious with electronic communications. "We prefer to meet the person directly and avoid digital platforms. Because of mass surveillance and new anti-terrorism laws we like to avoid social networks".

From the Philippines, Danguilang-Vitug said that caution is routinely exercised. "We continue to be very careful when meeting sources...We take precautions, make sure that our mobile phones are not bugged, use secure phones. We opt for personal meetings rather than e-mails for security purposes. If we have to use e-mails, some sources create separate e-mail accounts when answering our questions. But largely, face-to-face meetings are best".

Simple approaches like stretching the timeline between contact with a source and publication of their leaks have also been used to protect the confidentiality of connections and minimise the chance a confidential source will be identified. ICIJ's Gerard Ryle said: "The more layers you can put between you and the source sometimes is better, and a lot of that is time. If someone gives you some really hot information the temptation is to publish that right away, but that's also when your source is potentially at most risk." (Ryle 2015).

An editor who responded anonymously to a survey conducted in conjunction with this research highlighted the risks that long-term data retention could lead to identification of a source who was initially not an object of suspicion. Another news organisation's legal

advisor told this study's researchers that it is important to split encryption passwords between two journalists as an added precaution against data interception in the case of the detention of one party.

iii. *Taking responsibility for digital security*

Swedish public radio's Fredrik Laurin said that journalists are under-prepared when it comes to protecting sources in the 'digital hemisphere'. "Very few journalists use encryption and very few journalists even know how to use it - it's not in their toolbox and that is a major problem," he said. Laurin's hardcore dedication to digital security in the interests of protecting his sources extends to banning certain corporations' products among his reporting team. "We're using open-source material that we can change, where we are in control. Because at the end of the day, source protection is our mandate, our job, also under the law, and therefore we cannot use service providers who do not give us the ability to control the information."

Atanas Tchobanov, the Editor-in-Chief of Bulgaria's investigative journalism website Bivol and its extension, *Balkanleaks*, said that his means of communicating with confidential sources have been evolving alongside his investigative journalism practices since *Bivol* launched in 2010. He assesses who is likely to be eavesdropping and what their technical capability is, and if it is not advanced, then he will use Skype or WhatsApp without feeling the need for further encryption.

In Brazil, there is less concern about mass surveillance but nervousness about targeted monitoring of email and phone lines according to Executive Director of Journalism at Grupo RBS, Marcelo Rech. He said journalists in his organization are increasingly turning to chat apps to protect their sources. "People sometimes use WhatsApp, which is more tough to track...usually the sources prefer to talk by WhatsApp, or in person..." However, confidence in WhatsApp (an encrypted message service which is owned by Facebook) is misplaced, according to journalism safety expert Javier Garza, who advises the World Editors' Forum.

According to ICIJ's Ryle, another practical consideration is that digital security measures designed to protect sources can be unwieldy and time-consuming, and these factors remain a deterrent to many investigative journalists. The need for simple, cheap technological interventions to protect communications with confidential sources from surveillance was also underlined by an anonymous editor who responded to a survey connected to this Study.

The Committee to Protect Journalists (CPJ's) Courtney Radsch pointed out that, conducting meetings or interviews with sources face-to-face is not always possible, nor practicable – particularly on international stories (see also Section 10 below on Gender Dimensions Arising). Fredrik Laurin also reflected on this point in regard to an investigation where "we needed to investigate the situation on the ground in six different countries and it was impossible for us for safety reasons and also practical reasons. We needed to do our investigations digitally, over the phone, over Skype, over Facebook, email. That was a major challenge to employ all the necessary forms of encryption and secure communication".

But ICIJ's Gerard Ryle argued that too many journalists are growing unnecessarily paranoid. "... (T)here are some reporters I know who are completely paranoid about their computers - they're fantastic at encryption, everything is offline. But so what? Most of what they're working on isn't relevant." He said he did not believe that any method of source protection was 100% fool proof.

iv. Avoid flagging source protection efforts

Taking 'radical' measures to secure communications, including using encryption, can actually risk attracting unnecessary attention, Ryle indicated. "You are sometimes better off hiding in plain view". Even providing training in encryption to journalists can attract suspicion, according to Internet Sans Frontiers (ISF) journalist and lawyer Julie Owono.

The flipside, however, is the risk to the safety of journalists if digital technology is avoided, as recognised by Alan Rusbridger. He said: "You want them to have these devices [smartphones] because you want your reporters to be constantly in touch and you want them to file and take pictures, but these devices are also tracking devices." There was a dilemma between the risk of yielding digital information about sources, and having a device to help ensure personal safety, especially in conflict zones, he argued.

f. Training and editorial leadership

There is evidence that some news organisations have been slow to respond to the threat of source protection erosion in the digital age, with concerns expressed by several interviewees and survey respondents about the level of understanding among newsroom managers. Other research also indicates problems with the prioritisation of digital security and training by news organisations (C.f. Posetti 2014c, Holcomb, Mitchell & Page 2015).

However, *La Nacion's* Guyot told this study: "If we want journalism to survive and flourish in the 21st century, there is no other option than to give our reporters and sources the tools necessary to do their jobs". Internet Sans Frontiers' Julie Owono told the researchers that there has been a significant uptake of digital security training among journalists in Africa and the Arab States since the Tunisian uprising, as reporters have learnt that a single password is not sufficient to provide digital protection.

However, ARIJ's Rana Sabbagh said that even the best training cannot keep up with global intelligence services: "... (W)e train our journalists in encryption and how to protect their data, and tell them to always assume that everything you're doing online, on your computers, is accessible, because even if you give them the best software and training, the intelligence agencies are always a step ahead. They are using the latest technologies to decrypt the content".

Another point that several interviewees made is that seemingly innocuous local stories can be triggers for anonymous sources to make contact, meaning that a story that starts small can escalate into a major journalistic investigation, potentially causing confidential communications to be exposed through hostile data mining. Also, specialised coverage areas like health, politics, sport and financial reporting are increasingly vulnerable to source exposure due to leak investigations, according to investigative journalists and editors interviewed for this study.

g. Training the sources

"We're significantly increasing the training within the organisation to get this [digital security for source protection] on the radar of reporters to try to help them get around it," Rusbridger said. "But it's one thing to teach reporters, it's another thing to try and educate the public and the sources". He was acknowledging an emerging trend in source protection:

journalists and news publishers taking on a new responsibility - educating their sources in their own protection.

A multi-layered digital security approach, in combination with training and equipping sources to contact reporters securely, is the future of source protection, according to Fredrik Laurin. "You need to be aware of what tools are available and you need to do that yourself and to inform your sources on how to employ these methods". ICIJ's Ryle acknowledged the problem with digital safety practice among sources: "Most people who are outed as sources make the mistakes before they come to the journalist. And they use their own phone, their own computer, they even use an email address that can be traced back to them," he told the author.

Interviewees identified a role for NGOs and professional organisations in the training of sources to communicate more securely in the digital environment, and to support journalists to do the same. For example, the Swedish Union of Journalists recently published a book designed to educate journalists in online source protection called *Digitalt Källskydd*.

That level of source education is already happening at *The Guardian*, albeit in a minor way. A secure electronic dropbox has been launched but Rusbridger said that he doubted that many reporters had successfully gone out and installed PGP²² on a source's machine and taught them how to use it. *The Washington Post* and a number of other major news publishers have also introduced secure dropboxes in recent years.

There is also a need for sources to take independent steps to ensure their own digital security. "Sources have to share the responsibility with us, they have to believe in the cause they're trying to promote, and it should be a shared responsibility. Both a source, or a whistleblower, and a journalist are aiming for the same thing; expose the wrongdoings and corruption as well as promote good governance," ARIJ's Rana Sabbagh stated.

h. Collaborative strategies

A growing number of regional and international investigative journalism consortia (Alves 2014) has corresponded with an emerging trend of collective and centralised source protection. In its global investigations that involve myriad international publishing partners, ICIJ essentially becomes the source: "We don't take responsibility for the publication of our projects in each country, each organisation has to do that, but in terms of giving them the information, we become the source. In other words, we give them the documents. ICIJ is the source of the material," Director Gerard Ryle said.

Jurisdiction 'shopping' also becomes a strategy for some journalistic actors, who seek to base their digital content in countries with a stronger degree of privacy protections than those where the intended audience is based. This was the motivation for *The Guardian's* decision to move the Snowden investigation offshore to the US. It is also the reason Bulgaria's investigative journalism website Bivol is based in France, and a new international Francophone collaboration (see discussion of SourceSure below) is anchored in Belgium.

Gavin Millar QC pointed to another important area of collaboration in source protection – between journalists, freedom of expression activists and people he describes as 'good hackers'. "We've done a lot of work with the good hackers in Berlin and in London... we have

22 Developed by Phil Zimmerman in 1991, PGP stands for Pretty Good Protection. It provides cryptographic privacy protection through an encryption and decryption program <http://www.pgpi.org/doc/pgpintro/>

a stack of wiped laptops in the offices [of the Centre for Investigative Journalism which he chairs], which we sell to investigative journalists at cost price because we're a charity, having got some of the top hackers in the world to devise defence programs for them and to upload those programs to defend...against back door access to their digital material."

Meanwhile, interviewees explained how international news organisations have begun collaborating on platforms designed to securely receive digital information from confidential sources. AfriLeaks, for example, is a Pan-African project that uses a highly secure mailbox designed to receive leaked documents, which connects investigative media houses to whistleblowers. It is operated by the African Network of Centres for Investigative Reporting (Cummings 2015). Mexicoleaks also launched in 2015 (Attanasio 2015).

Sourcesure and Balkanleaks are similar Francophone and Bulgarian websites that allow whistleblowers to upload secret documents anonymously. Sourcesure, which is based in Belgium to take advantage of strong source protection laws there, was jointly established in February 2015 by France's *Le Monde*, Belgian publications *La Libre Belgique* and *Le Soir de Bruxelles* and RTBF (Radio Télévision Belge Francophone). Yves Eudes, Sourcesure's cofounder and a journalist at *Le Monde*, believes that the cross-border, multi-platform collaboration between leading Francophone news organisations is a source of protection for journalists and sources. "Unity is strength. This initiative could not have been launched by *Le Monde* or RTBF alone. Sourcesure is underpinned by a whole spectrum of collaborators, from liberal to conservative media outlets, united by common journalistic values," he said. Sources using the system are encouraged to download TOR software at their end before connecting with the system (Eudes 2015).

i. Further issues

For this thematic study, the interviewees were not specifically asked about how the practical precautionary measures discussed here could be complemented with other steps. A holistic approach would include advocacy to secure legal confidentiality to cover cases where technical secrecy or analogue methods proved insufficient. An example would be advocacy to secure legal limits on the use of intercepted digital information about confidential journalistic sources, in regard to admissible evidence in court. Further research could be done in this area as to how experts regard the complimentary range of measures to protect confidentiality.

Thematic Study 2:

How a State with one of the world's oldest and constitutional legal source protection frameworks is responding and adapting to emerging digital threats²³

Despite the strong legal frameworks that exist, Swedish journalists operate in an increasingly difficult environment in relation to the protection of sources in the digital age. Complications presented include the rapid development of technology and the time lag involved in Swedish legislation adapting in tandem. They also involve the impacts of national security-based restrictions, mass surveillance impacts, and the education and training barriers faced by both journalists and their sources. Collectively, these factors pose a significant challenge

23 Angelique Lu contributed to this case study

in a State that criminalises confidential source exposure and places the onus of responsibility for the preservation of confidentiality firmly at the door of journalists.

This thematic study is based on in-depth online research and long-form interviews with five key actors with expertise in the practical and theoretical issues surrounding Swedish legal source protection frameworks in an era of digital transformation. They include investigative journalists, the national journalists' union, lawyers, academics, and a legal policy specialist responsible for media freedom issues from Sweden's Department of Justice.

1. Strength of traditional Swedish source protection laws

The legal framework in place in Sweden for the protection of sources is based on constitutional provisions. The Swedish press enjoys protections in two out of the four pieces of legislation that comprise its constitution - the *Freedom of the Press Act* as well as the *Fundamental Law on Freedom of Expression* (Banisar 2007). In its earliest form - in 1766 - the Freedom of the Press Act included protection for anonymous authors (Banisar 2007:21; University College London, 2011). This is the foundation of Swedish source protection laws. *The Fundamental Law on Freedom of Expression* (1991) extends these rights to radio, television and 'other technologies', encompassing blogs and websites (Banisar 2007:72 footnote 203; Berglund-Siegbahn 2015.)

In Sweden, a source who divulges information to a journalist on condition of anonymity is protected under the Constitution (*Freedom of the Press Act*, Chapter 3; *Fundamental Law on Freedom of Expression* Chapter 2). In fact, it is a criminal offence for a journalist to breach this confidentiality agreement, regardless of whether the identity of a source is revealed 'through negligence or by deliberate intent.' (*The Fundamental Law on Freedom of Expression*, Chapter 2, Article 5; Nygren 2015). A journalist who reveals the identity of a source may be subject to a prison sentence of up to one year, or ordered to pay fines (*The Fundamental Law on Freedom of Expression*, Chapter 2, Article 5). The identity of sources is protected from disclosure except in limited circumstances, such as a breach of national security and high treason (*The Fundamental Law on Freedom of Expression*, Chapter 5, Article 3; *The Freedom of the Press Act*, Chapter 7; Article 3). Such exceptions must also be vetted by a Swedish court (Trehörning 2015) and Swedish courts are constitutionally bound to place weight on the protection of press freedom in their deliberations (*The Freedom of the Press Act*, Chapter 1 Article 4; *The Fundamental Law on Freedom of Expression*, Chapter 1, Article 5; Berglund-Siegbahn, 2015).

There was overwhelming consensus amongst the Swedish experts interviewed regarding the soundness of the legal framework that currently operates in Sweden (Berglund-Siegbahn, 2015; Laurin 2014, 2015; Nygren 2015; Trehörning 2015). According to media lawyer and Press Ombudsman Pär Trehörning: "The legal (framework) is very strong because it's a part of our constitution. The person who gets information from a source...can't reveal that. The only exception is in court, and it's extremely seldom".

Anita Vahlberg, senior advisor to the President of the Swedish Union of Journalists, stressed the significance of the constitutional requirements placed on journalists: "The constitution provides for protection of sources which is not a right for journalism, it's an obligation to protect your sources" (Vahlberg 2015). According to Vahlberg, this obligation underpins Swedish journalism practice: "Swedish journalists take the question of protection of sources very seriously," she said.

There is some debate over the criminalisation of source disclosure by journalists, and whether it places an unfair burden on journalists to protect their sources in the digital era. Global Freedom of Expression organisation *ARTICLE 19*, raised issues in a paper discussing Tajikistan's 2013 media law proposing an analogous legal obligation on journalists not to reveal the identity of their sources:

Article 26 [of the Tajikistan media law] reverses traditional presumption not to disclose information. Although the matter has never been dealt with by an international court, there are potentially serious problems with imposing source confidentiality as an obligation on the media and it would be preferable for Tajikistan to follow the dominant practise in this area. (ARTICLE 19 2014, p.18).

ARTICLE 19 argues in the case of Tajikistan that source protection should be a legal right, not a legal obligation. The Knight Center for Journalism in the Americas' Silvia Higuera stated, in an interview with this Study's researchers, that a journalist should not be held accountable if their sources were exposed as a result of surveillance or other issues connected to their digital practice: "I want also to be clear...our obligation to protect our information doesn't mean that when a journalist's communications are intercepted, it's her or his fault. The journalist is still the victim, and abusers should be prosecuted" (Higuera 2015).

Nevertheless, those who stand by the criminalisation of the revelation of a confidential source's identity without their permission, believe this onus to be core to the success of the existing legal framework to date. It is seen as not just protecting the journalist, but also ensuring that a source is confident to divulge information on the understanding of anonymity. It is not clear, however, how the Swedish courts might interpret a journalist's responsibility to ensure the digital security of their communications with confidential sources to avoid their unmasking through interception or bulk data analysis, for example. This is an issue that may require testing in terms of the measures considered to be reasonably required of journalists to secure their digital communications to avoid legal liability if their sources are exposed.

2. Applying the Certificate of No Legal Impediment to Publication online

Journalists in Sweden do not require tertiary qualifications to practise journalism, nor are they required to have such qualifications to be eligible for protections under the constitution (Laurin 2015, Berglund-Siegbahn 2015). However, publishing platforms do require registration for the purpose of accessing certain protections. Protections found in the Swedish Constitution apply to the registered medium and not the individual journalist (Laurin 2015; Nygren 2015; Berglund-Siegbahn 2015). Thus, the eligibility for protection is for the platform, not the individual as such, and there are variations here. Thus, traditional forms of news media are automatically covered by Swedish constitutional press protections (Berglund-Siegbahn 2015), however Swedish law prescribes a number of additional requirements that would need to be met in order for websites to qualify for source protection.

According to the editor of the investigative department at Swedish Public Radio, Fredrik Laurin, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, despite being written in 1949 and 1991 respectively, were arguably drafted in wide enough terms to encompass bloggers:

...The law applies not to the journalist as some kind of certified individual, source protection law applies to anyone who is willing to divulge important information for the purpose of having it published. It doesn't define who you divulge this information to. (Laurin 2015)

However, on the publishing side, a website or publication with a Swedish Editor-in-Chief must be certified if it wishes to be covered by Swedish source protection law. It is common for niche and start-up websites and blogs to have only one contributor, who would also need to be considered the Editor-in-Chief in this context. In this mode, those who are not members of traditional media, such as bloggers, social media actors or people creating a new website, can choose to apply for a 'certificate of no legal impediment to publication' in order to enjoy Swedish constitutional coverage for periodicals including source protection provisions. Individuals or groups wishing to certify their website under this structure gain the same protections as traditional media (for example in regard to a degree of libel protection) as well as responsibilities, which include the legal obligation to protect source confidentiality (Berglund-Siegbahn, 2015, Laurin, 2014, 2015).

The provisions governing the 'certificate of no legal impediment to publication' include the requirement that the website has a uniform appearance across its pages, it cannot be altered by anyone other than editorial staff, and an Editor-in-Chief must be appointed who is liable for any violations of provisions governed by the Constitution (Fundamental Law of Freedom of Expression: chapter 1; article 9). Further, the Editor-in-Chief must satisfy a number of 'required qualifications' (The Freedom of the Press Act Chapter 5) which stipulate, inter alia, that the would-be-editor must live in Sweden, be aged above 18 years, and must not be an undischarged bankrupt or under guardianship (The Freedom of the Press Act, Chapter 5, Article 2). In an analysis conducted by the Association for Progressive Communications (APC), the additional obligations and protections offered by registering a website under the Swedish constitution was analogous to that of a boxing ring:

Boxers enter the ring knowing that in the ring certain rules apply, protecting them from illegal actions; but they are at the same time subject to certain physical risks that are allowed by the same rules that protect them in the first place. The risk of taking on the liability of being a responsible editor is something the editor would have to accept to be able to enjoy the benefits of source protection, inquiry protection and prohibition of censoring. (Almström, H, 2011).

The experts interviewed for this thematic study were asked if the application for certification process in Sweden is actually a form of licensing. They highlighted that it is a voluntary process and does not prohibit anyone from publishing without a certificate. It is not required for a blogger to have a 'certificate of no legal impediment', and there is also no legal basis to withdraw a certificate (where issued) for reasons of content. The interviewees were reluctant to even call the certification process 'registration' due to their rejection of registration procedures used in other contexts to deny or cancel the status of a person or platform seeking to publish journalism. (Berglund-Siegbahn, 2015; Laurin 2014, 2015; Nygren 2015; Trehörning 2015).

Non-traditional media publications without a 'certificate of no legal impediment', are instead covered by a third part of the constitution titled the Instrument of Government (Chapter 2, Article 1), and its provisions for fundamental rights and freedoms, as well as by provisions under the European Convention for Human Rights (Berglund-Siegbahn 2015; Axberger 2015). In an interview for this Study, Hans-Gunnar Axberger, Professor of Constitutional Law at the University of Uppsala, maintained that the strong protections for journalists

contained within the Swedish legal framework have been upheld in the context of new technological developments. But he pointed out related issues where expectations have changed and clarity is reduced. "For a source who provides information to a blogger who has not obtained a 'certificate of no legal impediment', there is potentially an uncertainty as to the strength of what the expectation of anonymity can be which they may not even be aware of themselves", he said. Furthermore, he pointed out that while protections for authors of texts and their sources remain strong, the subjects of online content produced by non-traditional media are in a much weaker position when it comes to accessing legal recourse than is the case with traditional media (Axberger 2015).

3. Swedish source protection may not extend to digitally stored content

Swedish authorities are generally prohibited from seizing journalistic materials that may reveal the identity of a source (Laurin 2014; Trehörning 2015, *The Fundamental Law on Freedom of Expression*, Chapter 3, Article 5). There are exceptions, however, as Laurin points out. "For example, in the Swedish Criminal Act, there are possibilities for the police to do a house search and if they suspect me of a crime, they can come to my house and they can break in and they can grab equipment, paper work, computers ...". Nevertheless, "... source protection is paramount and therefore the police cannot go through documents in the newsrooms that contain source protected information. That has to be dealt with (via) a special order where the court appoints special measures to protect the source," he said.

However, while hard copy material (e.g. notepads and paper files) kept by journalists that may reveal the identity of sources are constitutionally protected from police searches under the conditions described above (*The Fundamental Law on Freedom of Expression* Chapter 2, Article 4; Berglund-Siegbahn 2015), the same protections do not automatically extend to digitally stored materials – such as recording devices, discs, smartphones, portable hard drives, and computers (Berglund-Siegbahn, 2015; Laurin 2014; 2015).

This source protection gap was illustrated in a case involving journalist Trond Sefastsson, who was investigated by Swedish authorities in 2007 in relation to allegations of bribery and tax evasion (Andersson et al 2012). A search warrant was executed in the course of the investigation and digital equipment, including a computer containing information that could reveal sources' identities, was seized. The seizure was met with opposition by members of the National Press Club as well as TV4, the television channel which employed Sefastsson, (Hamrud, 2007). Fredrik Laurin said this is an area where the Swedish law needs to be updated.

Members of the Swedish media also said the seizure of Sefastsson's data could impact on citizens' confidence in a journalist's ability to protect their sources (Hamrud, 2007). Some expressed concern over what they saw as the disproportionate nature of the seizure compared with the allegations (Hellberg 2007). The Deputy Chief Prosecutor in the Sefastsson case, Björn Blomqvist has resisted these suggestions and criticisms. His argument hinged on the potential for journalists facing criminal allegations to delete incriminating evidence during an investigation (Hamrud, 2007). In October 2008, a Swedish court ruled that police authorities had the right to retain Sefastsson's computer because of the serious nature of the allegations levelled against him, despite the fact the computer contained material relating to his work as an investigative journalist over the course of a decade.

There have been a series of cases since the Sefastsson case in 2007 that have implications for the protection of sources in Sweden. In March 2011, in an operation designed to combat child sex tourism, Swedish customs and police officers raided the premises of 28 people. Among them was Swedish journalist Bertil Lintner, whose computer and phone were searched in his absence (Folkbladet 2015). In another case, Sveriges Radio correspondent Nils Horner was killed in Afghanistan in March 2014. After his death, many of his belongings were confiscated by the International Public Prosecution Office, including computers and notebooks. The District Court decided that everything would be returned to his estate except for his computers, sim cards and mobile phone. In October 2014, however, all equipment was returned to Sveriges Radio (Folkbladet 2015). Also in October 2014, a Dagens Nyheter (DN) photographer's camera memory card was seized by the Swedish military because it contained pictures of a military prohibited area. The military seized the memory card, which contained 47 images. Under the Sweden constitutional laws *The Fundamental Law on Freedom of Expression's* and the *Freedom of the Press Act's* provisions for 'anskaffarfrihet' and prohibition against censorship, everyone has the right, subject to freedom of expression provisions, to procure data in any subject for the purpose of publication and to publish anything without prior scrutiny of authorities (Högsta Domstolen 2015). The DN photographer claimed that the photos taken were protected under the "anskaffarfriheten" provision. In June 2015, the Supreme Court declared that the constitutional provisions outweighed the law on protection of prohibited areas.

In another case, in March 2015, Swedish Police in the course of a murder investigation seized the phone and laptop of *Folkbladet* journalist Elin Falk who had been the victim. *Folkbladet* Editor-in-Chief Anna Lith objected, stating that the seizure of materials was incompatible with Swedish constitutional protection of sources (Hellberg 2015). The Lycksele District court upheld the seizure of Falk's phone and computer but ordered the return of her notepad. The Court also found that the electronic items could be searched and that the proceedings would be conducted behind closed doors. The decision was immediately appealed by Lith and *Folkbladet*. The Court of Appeal's decision rested on the question of whether the prohibition of the confiscation of written documents could extend to electronic information. Under Swedish law, written documents cannot be confiscated if the documents can be presumed to contain information given by a source under the condition of anonymity under Swedish constitutional law. In its decision, the court stated that the decision required a balance between two competing considerations, a criminal investigation and the need to protect the anonymity of sources as stated under the Swedish constitution.

However, while the Swedish Court of Appeal acknowledged that electronic information was equally important to written information, it found that it would not be permissible to ban the confiscation of electronic storage devices whenever there was a risk that the identity of a source could be revealed. One of the factors that influenced the court's decision in this regard was the presumption that electronic content could be searched specifically without revealing other information (e.g. via keyword searches), distinguishing it from written documents. However, the Swedish Court of Appeal took into account the broad nature of the search parameters by the Swedish Police, stating that because the investigation did not know what it was specifically searching for, the search would constitute the violation of an individual's right to submit information to the media anonymously. The prosecutor proposed that a representative from *Folkbladet* be invited to attend the examination of the computer and mobile phone. However, the Swedish Court stated that there was still a risk of exposing a source due to the broad nature of the general search by prosecutors. The Court of Appeal ultimately decided that for these reasons the prosecutor's submissions to seize

the computer and mobile phone could not be considered to outweigh the constitutional interest to protect the identity of sources.

In 2011, a report was published by the Statens Offentliga Utredningar (Swedish Public Inquiry) investigating, among other things, seizures conducted by public authorities (Statens Offentliga Utredningar 2011). Legal advisor at the Ministry of Justice Division for Constitutional law Katarina Berglund Siegbhan told this study that the following recommendation was proposed:

If a computer or another digital information carrier is seized, and may contain protected information – for example information covered by the rules about protection of sources – the person from which the computer is seized should have the opportunity to be present during the examination of it. If protected material is found, the person who performs the examination immediately must stop [viewing] this material. (Förundersökning; SOU 2011:45)

The commission's proposal was being considered by the Swedish Government at the time of writing.

A number of other approaches for updating Sweden's source protection frameworks have been suggested. Swedish media law academic Hans-Gunnar Axberger proposed that prosecutors should go before a court ahead of seizing a journalist's computer in the future (Hamrud, 2007). Swedish media lawyer Pär Trehörning proposed to researchers a safeguard through an independent third party who would assess the content to determine whether there is information revealing the identity of a source. However, as Trehörning recognised, this presents a conundrum: how does the independent third party protect such information? Once a party has seen content, including the identity of a confidential source, they cannot 'unsee' it.

Swedish Radio's Laurin said that until this discrepancy in source protection law is addressed, Swedish journalists and their sources will remain vulnerable.

4. Implications of interception, surveillance and data retention

As discussed in the regional overview section of this Study, new anti-terrorism laws were passed in Sweden in 2009, authorising the National Defence Radio Establishment (FRA) to access and store all telecommunications (including domestic communications) that cross the country's borders via cable or wireless. There are no exemptions for journalistic communications. According to a European Parliament study *National programs for mass surveillance of personal data in EU member states and their compatibility with EU law* (Bigo et al 2013), Sweden is becoming an increasingly important partner of the global intelligence network, engaging in operations and programmes for the mass collection of data. According to the EU report, FRA has been undertaking bulk 'upstream' collection of private data – content and metadata – where communications crossed Swedish borders.

These developments may impact on Sweden's historically strong legal source protection frameworks. In the *Folkbladet*/Falk case discussed above, the Swedish Supreme Court found that the seizure of digital journalistic communications data could be supported if the terms of the search were sufficiently narrow to avoid wholesale exposure of sources. However, in the context of mass surveillance, it may no longer be technically possible for journalists to promise protection from exposure to their confidential sources when they involve digital communications that cross Sweden's borders.

5. Lack of applicability of Swedish source protection to social media platforms in Sweden

The protections provided by the existing Swedish legal framework and the 'certificate of no legal impediment' to publication do not extend to acts of journalism published on social media platforms such as Facebook and Twitter, whether they are performed by bloggers or professional journalists as curators and editors of their own accounts. The legal experts interviewed agreed that this may present issues for any social media actor who uses these platforms to publish material based on confidential sources in Sweden.

Katarina Berglund-Siegbahn, legal advisor at the Ministry of Justice Division for Constitutional law, recognised that "it might be quite strange of course that you can say it somewhere and have to protect your sources when you write something on your blog, and you don't have the same protection on Facebook".

Journalist Fredrik Laurin maintained that the current legal framework offered in the Swedish constitution provided adequate protection. According to Laurin, any additional provisions protecting content published on social media would be unnecessary. But media academic Dr Gunnar Nygren from Stockholm University told the researchers: "[I]t's important that all kinds of media outlets, no matter what platform have the same sort of source protection. Even if it's a website. All platforms should have equal kinds of laws".

Social media platforms and chat apps present additional problems in relation to source protection in Sweden. Issues regarding transparency by such third party intermediaries, the fact they are generally under foreign jurisdiction, along with potential pressure for data handover within these jurisdictions, are other problems identified by Laurin. As a result, mindful of being bound by the Swedish constitutional obligation that binds him as a professional journalist to protect his sources, Laurin has actively boycotted such platforms.

6. Practical Moves/ The Journalist's Obligation

The legal obligation placed on Swedish journalists to protect their sources is complicated by digital developments. Consistent with trends presented in other regions in this Study, Swedish journalists are faced with difficulty in protecting their sources in a mass surveillance environment. According to Anita Vahlberg, senior advisor to the President of the Swedish Union of Journalists:

Our major problem is not legal protection. That's part of the Swedish constitution. The law is solid. The problem is more practical when it comes to protecting sources when email, telephones, everything is monitored by one or many authorities, sensitive information... can be monitored [and] can be hacked by others.

There have been moves by the Swedish Union of Journalists – so far unsuccessful – to introduce exemptions for journalists – in particular for freelancers – from anti-terrorism legislation, data retention provisions and the monitoring of telephone communications, as these functions may undercut source protection (Vahlberg 2015).

Swedish journalists have also suggested defensive responses dependent upon changes in journalistic practice. According to Fredrik Laurin: "What I see is a change in behaviour from a practical point of view, it's not so much legal but it's much more a question of how we as journalists handle the information in reality". Approaches identified include the employment of encryption techniques, being cognisant of where servers are held, as well as the laws

that regulate the data in the country in question, and actively boycotting externally owned companies and products.

Consistent with the broad findings in the overarching study, some of the experts interviewed for this thematic study encouraged reporters and sources to use analogue methods of engagement with confidential sources, such as meeting in person, using paper, avoiding emails, using so-called 'dumb' phones, and so on in order to avoid surveillance, data retention and digital equipment seizure.

The Swedish Union of Journalists, in collaboration with other Swedish organisations, has published information booklets educating journalists on appropriate practises, while Swedish public broadcasters have implemented technical training for employees. However, this kind of response is also recognised as having limits in terms of decreasing resources in newsrooms, especially with regard to regional, rural and independent media (Vahlberg 2015; Trehörning 2015).

7. Education of Sources

Swedish media experts have also suggested the education of sources as a means of assisting in preserving their confidentiality. Journalists' union lawyer Pär Trehörning stated that first contact between a source and a journalist may be problematic in the protection of sources and thus the only way to improve digital security at that point would be to provide training to sources and the public broadly.

8. Conclusion

Despite reliance on what is a very strong traditional legal framework for source protection, Swedish journalists, like journalistic actors in other countries, are facing difficulty maintaining their commitment to source confidentiality in the digital age. The legal obligation on Swedish journalists to protect their sources may become increasingly complex, placing both journalists and their sources at greater risk. The primary threats come in the form of digital reporting practices, surveillance, data retention, the seizure of digitally stored information, a lack of protection over social media platforms, and digital companies falling under different jurisdictions. Gaps in the country's source protection have emerged as a result.

Thematic Study 3:

Towards an international framework for assessing source protection dispensations

This thematic study maps the development of an 11-point framework for assessing the effectiveness of legal source protection systems in the digital era. It draws on interviews with 31 international experts across all five UNESCO regions. These experts span the areas of law, human rights, academia, professional journalism, and ICT experts. The interviews were conducted in person, via Skype, telephone and email between November 2014 and May 2015. Based on initial study of the issues, and in consultation with UNESCO, the researchers presented a draft eight-point standard for the experts' consideration. It was then developed and expanded into an 11-point assessment tool, based on the experts' input, in the course of this thematic study.

The emergent assessment tool is designed to be applicable to all international settings for measuring the effectiveness of legal source protection frameworks within a State, in the context of established international human rights laws and principles.

Experts interviewed:

1. Professor Rasha Abdulla (Media Studies academic, Egypt)
2. Ricardo Aguilar (Investigative journalist, La Razón, Bolivia)
3. Catalina Botero (former Special Rapporteur, Freedom of Expression, Inter American Court of Human Rights, Latin America)
4. Peter Bartlett (Barrister specialising in media law, Australia)
5. Cliff Buddle (Senior Editor, South China Morning Post, China)
6. Umar Cheema (Centre for Investigative Reporting, Pakistan)
7. Zine Cherfaoui (International Editor, El Watan, Algeria)
8. Marites Dañguilan-Vitug (Investigative journalist, Philippines)
9. Tomaso Falchetta (Privacy International)
10. Javier Garza (Journalist/Journalism safety expert, Mexico)
11. Silvia Higuera (Journalist, Knight Centre for Journalism in the Americas, Latin America)
12. Daoud Kuttub (Journalist/Media freedom activist, Jordan)
13. Fredrik Laurin (Director Investigative Department, Swedish Public Radio)
14. Professor Renaldo Lemos (Director of the Institute for Technology and Society, Brazil)
15. Justine Limpitlaw (Legal expert – electronic communications, South Africa)
16. Henry Maina (ARTICLE 19, Kenya)
17. Susan McGregor (Tow Centre for Digital Journalism, USA)
18. Toby Mendel (Executive Director, Centre for Law and Democracy, Canada)
19. Gavin Millar QC (Lawyer/Chair of the Goldsmith's Centre for Investigative Journalism, UK)
20. Peter Noorlander (Chief Executive Officer, Media Legal Defence Initiative, UK)
21. Leanne O'Donnell (Law Institute of Victoria, Australia)
22. Alan Rusbridger (Editor-in-Chief, *The Guardian*, UK)
23. Rana Sabbagh (Executive Director Arab Reporters for Investigative Journalism, Jordan)
24. Josh Sterns (Journalist/Director, Journalism & Sustainability, Geraldine Dodge Foundation, USA)
25. Charles Tobin (Media lawyer, US)

26. Pär Trehörning (Lawyer/Press Ombudsman, Sweden)
27. Pedro Vaca Villareal (Executive Director, Foundation for Freedom of the Press, FLIP, Colombia)
28. Professor Dirk Voorhoof (Media law academic, Belgium)
29. Professor George Williams (Constitutional Law expert, Australia)
30. Prof Wei Yongzheng (Professor of Media Law, University of China)
31. Jillian York (Executive Director, Electronic Frontier Foundation)

Unless otherwise indicated, all sources were interviewed between November 2014 and May 2015.

Interest in a universal framework

The expert actors interviewed for this case study saw value in a universal framework for effective legal source protection internationally.

Executive Director of Canada's Centre for Law and Democracy Toby Mendel contextualised the role of such an international framework. "Although there have been a few international cases on this subject – most commonly at the European Court of Human Rights – these only address the specific issues raised on the facts of the cases and leave many issues unclear. The development of a model law on this issue could be useful as well. I would also like to see countries adopting best practice legislation in this area". The head of the Media Legal Defence Initiative (MLDI) Peter Noorlander pointed to a Council of Europe policy statement on legal source protection as a useful starting point. However, Executive Director of Arab Reporters for Investigative Journalism (ARIJ), Rana Sabbagh, cautioned about political will to implement such a framework by a number of States.

1. Draft Assessment Framework

The draft that emerged from the initial research process was presented to the expert interviewees as an eight-point framework for review. Their comments and concerns are discussed under each proposed point below.

In the draft, it was suggested that a source protection framework might:

1. Recognise the ethical principle and value to society of source protection

"I support this because it is a basic premise in journalism. It will help the public understand the importance of unnamed sources," Philippines investigative journalist Marites Danguilan Vitug said, reflecting the views of most of the interviewees.

However, Toby Mendel disagreed: "I don't think it is appropriate for such a law to recognise an ethical principle. Rather, it should recognise the human rights foundation for source protection, which, under international law, is based on the right of the public to receive information, and not the right of journalists or others to disseminate it, because then it would need to attach to anyone who disseminated information, i.e. everyone".

Belgian media law Professor Dirk Voorhoof made a similar point regarding the international human rights law underpinning source protection. Colombian press freedom activist Pedro

Vaca Villareal also recommended the alteration or withdrawal of this principle, because "... legislating journalistic ethics can be tricky". However, others pointed to the fact that law is often built on principles of ethics.

2. *Recognise that protection extends to all acts of journalism, defined in inclusive terms*

Egyptian academic Dr Rasha Abdullah said that protection should cover any medium, and encompass blogs and tweets.

USA media lawyer Charles Tobin commented on the issue of whether there should be a 'regular practice' test to identify what counted as journalistic acts (as applied in several jurisdictions). He opposed such a criterion: "a first time freelance journalist who places an article in the public interest in a notable forum is entitled to be treated as a journalist for most purposes, including source protection".

Toby Mendel acknowledged a need to define 'acts of journalism' and pointed to the possibility of exceptions. "I do not believe that source protection should attach to journalists but, rather, to the social activity of disseminating information of public interest to the public - which might well exclude certain journalistic functions. There would also need to be definitions of 'information'[such as] what sorts of communications are covered as well as of sources".

The idea of applying a 'public interest test' to measure the validity of an act of journalism for the purpose of source protection coverage is complex. While the investigative journalists interviewed expressed belief in the value of a public interest test, they had difficulty defining it. The legal experts' views differed. Charles Tobin favoured the inclusion of a public interest test to measure the validity of an act of journalism for source protection coverage. "It has to turn on the specific public interest that was served, the specific purposes that the journalist had in mind, the means that they employed and any other factor that is relevant". For him, public interest had to "be something that serves a larger public discussion on an issue that has mass effect or interest".

However, UK QC Gavin Millar argued that a public interest test presents potential danger, particularly where the public interest element is not clear-cut, and where judges could use a restrictive understanding of 'public interest journalism' to require source disclosure while trying to navigate the middle ground between confidential sources about celebrity tattle and revealing government corruption. Such territory, Millar argued, needs to be resolved on a case-by-case basis.

Former *Guardian* Editor-in-Chief, Alan Rusbridger, proposed that some acts of journalism should not enjoy the privilege of source protection. "If all they're doing is collecting the information on the sex lives of footballers, why should there be any protection for that?" he asked. US journalist and press freedom advocate Josh Stearns thought the public interest motivation needed to be untainted. "I do think something around the idea that they are not publishing this to extract vengeance or blackmail, and it is indeed in the public interest, is important".

ARTICLE 19's Director in East Africa, Henry Maina, made the point that protecting the 'public interest' also serves another function: "We need to ask for due processes that continuously balance and protect our rights and the public interest, as opposed to just protecting journalists as an entity...".

Public interest is also used to justify arguments against granting journalists source confidentiality. At a meeting on source protection in the UK, former senior civil servant Sir David Omand reportedly said that the public needs to know that those who work in public service can be trusted with confidential information. “That, too, is a public interest and a mighty strong one in my point of view to weigh alongside the protection of journalists’ sources”. A different perspective at the same meeting came from *The Guardian’s* Rusbridger, who was reported as saying that when protection of sources “is done in the public interest, society as a whole benefits from these conversations and these relationships”. He further stated: “We have to keep reminding ourselves and other people why as journalists we understand that much if not most of the information that that we receive of value comes from people who are not authorised to talk to us. Or who can talk more honestly if they can talk secretly” (Ponsford 2015b).

The issue of acts of journalism leads into the question of how protection may be relevant to a range of actors performing these acts. Professor of Law at Rio De Janeiro State University Ronaldo Lemos stated: “In the capacity of a member of the Social Communications Council in Brazil, headquartered in the Brazilian Congress, I have supported that those laws should apply to all professional information gathering agents. This is still a loose term, but it denotes that not only ‘journalists’ deserve source protection laws”.

Colombian journalist Silvia Higuera said that source protection laws should apply to “acts of communication or information” (Higuera 2015). She said she would define such acts as having the purpose of communicating or informing audiences about issues of public interest. “Of course, I’m referring to information that is accurate, fair and has other qualities of what is traditionally known as journalistic information. ... people who do that should be protected”. Higuera also referred to the definition of journalists provided by the Office of the Special Rapporteur for Freedom of Expression of the Inter American Court of Human Rights in its 2013 report *Violence Against Journalists and Media Workers* which states that journalists are individuals who “observe and describe events, document and analyse events, statements, policies, and any propositions that can affect society, with the purpose of systematizing such information and gathering facts and analyses to inform sectors of society or society as a whole” (Botero 2013 p2). It follows from this definition that media workers and support staff would be included, along with citizen journalists.

FLIP’s Pedro Varca Villareal expressed an even broader view: “...protection should be as broad as possible and should refer to any person making a diffusion of information or opinion with public purposes by any virtual environment”.

While the boundaries of what is journalism may vary according to perspectives, there is recognition that the practice can be done by individuals who are not fulltime or professional journalists, but who nevertheless may rely on confidential sources in the public interest – as interpreted on a case-by-case basis. Not everyone who does journalism is a journalist, but the argument for source protection nevertheless applies to such cases where the output constitutes information in the public interest.

3. *Recognise that source protection does not entail registration or licensing of practitioners of journalism*

There was overwhelming support for this principle by the experts.

4. *Affirm that confidentiality applies to the use of any collected digital personal data by any actor*

There was some confusion and misinterpretation among the experts interviewed in response to this proposed principle. It has since been amended (see final framework recommendations below), but at the time of interviewing, it was explained that this point referred in actuality to third party intermediaries.

The Tow Center's Susan McGregor stated that there needs to be more responsibility and accountability within organisations and companies that routinely collect personal data:

...as a company you cannot collect data if you cannot adequately protect it. The truth is most companies can't. You have to be able to demonstrate the ability to adequately protect any consumer data you're going to collect and centralise if you're going to collect it. I think if you put that restriction on it, companies will collect a lot less data.

Algerian newspaper editor Zine Cherfaoui went further, requesting measures to prevent email providers and social media companies handing over journalists' data to the authorities. "We would like those responsible, or in charge of social networks, to guarantee the inviolability of email exchanges, basically that no one hands over emails, especially when concerning journalists," he said.

That is a point supported by Australian digital media law specialist Leanne O'Donnell who was concerned about a data retention laws in her country, which she feared could effectively undermine source protection laws. O'Donnell advocated for a data retention exemption for journalistic communications to ensure that law enforcement agencies could not request data pertaining to journalists' interactions with their sources, consistent with international source protection standards:

That's what the Court of Justice of the EU recommended in their decision in April (2014) where they invalidated the EU data retention directive. Because one of the issues with the EU approach was there was no recognition that with certain information in our society there's an expectation that the information is confidential, information such as communications with journalists and communications with lawyers, for example.

However, Toby Mendel from the Centre for Law and Democracy disagreed with the inclusion of principle 4 in the framework. He said that source confidentiality was a different idea to data protection, which had its own rules. From another perspective, a principle applying to third parties could be seen as shifting the onus of responsibility for source protection from the journalist or the State to the third party intermediary. In Sweden, under existing law, it is the journalist who would potentially face charges if the source was revealed by the third party. Investigative journalist Fredrik Laurin said "... (S)ource protection is something that I am bound to uphold personally. It's me, Fredrik who goes to prison if you are my source and I lose my notebook at the bar and your name comes out because of that. That's my fault and I go to prison. That's why I don't use Gmail for example. Or Facebook". He added: "I need to survey – which I do, very thoroughly – who my suppliers are. I know exactly where my server is, I know exactly what the contract says, the hard discs in that server are named in my name. With my phone number. There's a tag on the material that says this material is protected according to the Swedish constitution".

Generally, a journalist should not be blamed for negligence of a third party, but it is also clear that securing confidentiality at the level of intermediaries does not obviate the roles of both the journalist and the source.

5. *Define exceptions to all the above very narrowly in terms of purposes allowing limitation of the principle*

Professor Rasha Abdulla argued that the provision for exceptions to source protection was problematic because such exceptions are too often abused, especially in the name of national security. However, ARTICLE 19's Henry Maina said there was a need for exceptions to source protection, such as where a journalist knew the identities of people involved in terror attacks. "...We need to clearly understand the right to maintain the confidentiality of sources is not an absolute one," he said.

Toby Mendel said that no State would adopt a source protection rule without having exceptions, and the key issue was how to define the exceptions.

Silvia Higuera from the Knight Centre for Journalism in the Americas highlighted the importance of this principle: "We must understand that there are some exceptions to all rules, particularly in this time of terrorism threats, but especially because freedom of expression is not an absolute right".

FLIP's Pedro Vaca Villareal said it would be "...important to have the proposal come from the community of press freedom which would be timely and would specify those exceptions. Leaving it to the discretion of governments may mean that exceptions are broad and vague". Alan Rusbridger articulated the need to tightly limit exceptions.

6. *Define exceptions as needing to conform to the necessity provision, in other words, when there is no alternative*

Gavin Millar QC suggested that an appendix of definitions and exemplars, to assist with legal argument in cases where the 'necessity provision' is tested, should ultimately accompany a legal source protection framework. Specifically, he thought the 'Goodwin Principle' should be referenced. UK Journalist Bill Goodwin won a landmark case in the European Court of Human Rights in 1996 in which the judge ruled that a journalist could not be compelled to reveal a confidential source, unless there was an "over-riding requirement in the public interest" (ECtHR 1996). Millar called for practical examples of categories of cases where an exception to protection might just be acceptable, in order to rule out the ones where it would not be acceptable.

Toby Mendel suggested that the principle needed to go further to articulate additional protections. He supported Millar's view that there need to be explicit examples of exceptions provided in order to avoid abuse by authorities. "Of course, any restriction on freedom of expression must meet the necessity standard but the issue is: what does this imply in the context of source confidentiality? I think the idea of a lack of an alternative means of accessing the information is an important concept here, but it only takes us so far, as law enforcement authorities often cannot obtain the information elsewhere. We need further protections".

Tomaso Falchetto from Privacy International recalled that the Council of Europe's Council of Ministers' 1996 recommendations on protection of sources in national security situations had noted: "Having regard to the importance of the confidentiality of sources used by journalists in situations of conflict and tension, member states shall ensure that this confidentiality is respected". In addition, Falchetto pointed to the 2005 call by the Council of Ministers "on public authorities in member states: [...] to respect, in accordance with Article 10 of the European Convention on Human Rights and with Recommendation No. R (2000) 7, the

right of journalists not to disclose their sources of information; the fight against terrorism does not allow the authorities to circumvent this right by going beyond what is permitted by these texts”.

7. *Define an independent judicial process, with appeal potential, for authorised exceptions*

Charles Tobin proposed that there should be rules in place in any agency that can issue a subpoena to reveal the identity of a source. These rules should involve deep deliberation, approval at the highest level and pre-engagement before the issuance of any subpoena or search warrant for a journalists’ confidential source.

Alan Rusbridger also called for “a high and independent hurdle” so that it was not a case of one policeman authorising another policeman to access journalists’ data.

While journalist and founder of the Arabic Media Internet Network, Daoud Kuttab, welcomed this provision as a “very helpful mechanism”, Marites Danguilan Vitug pointed to issues with the independence of the judiciary in some States where the judicial system can be politicised.

Charles Tobin also argued for an adversarial framing of the ‘independent judicial process’ in the context of a request to access a journalists’ confidential data, and for this to involve transparency so that the journalist would be entitled to an advocate, and have access to all arguments and information.

Gavin Millar QC pointed out that some countries have used covert requests for access to journalists’ data (including metadata). “You get the judge involved but still the journalist doesn’t know about it. And the position of the NUJ (National Union of Journalists), and the International Federation of Journalists, and most journalist organisations in this country, is that that’s not enough. The issue is do you put the journalist on notice of the possibility? Then you can’t just have covert access to journalistic source material”.

As discussed in section 2.c below, the issue of transparency of process is linked to this Principle 7, but raises further issues. However, an independent judicial process with appeal potential and adversarial framing may be institutionalised even in the absence of full transparency.

8. *Criminalise arbitrary and unauthorised violations of confidentiality of sources by any third party*

Silvia Higuera from the Knight Centre for Journalism in the Americas said this point should be in law and that violations of source confidentiality should be prosecuted. Toby Mendel agreed with this principle, as long as the ‘unauthorised violations’ were also deemed to be ‘wilful’ (i.e. that they included the necessary intention which is required to be guilty of a criminal action). Stronger laws governing surveillance and data retention by companies are necessary for the sake of source protection, according to the Tow Center’s Susan McGregor.

Marites Danguilan Vitug argued that sanctions needed to be added to this principle, as did Henry Maina who said that sanctions must be clearly defined. Maina also pointed out: “Care needs to be taken with criminalising arbitrary and unauthorised violations, though, to ensure this does not restrict the very freedom of expression it is intended to protect”.

Journalism safety expert Javier Garza Ramos indicated that there is a need for sanctions to be applied to those parties seeking to subject journalists, and by extension their sources, to surveillance: “If you’re going to extend legal protection for journalists for sources, then there should also be some legal consequence on surveillance of journalists, or on anybody, not just journalists. It should be at least prosecution and jail time for whoever is doing illegal surveillance, unauthorised surveillance”.

However, Professor Ronaldo Lemos, Director of the Institute for Technology and Society in Brazil, expressed scepticism about such mechanisms and Principle 8 (as proposed here):

I think the rule would need to define the types of situations to which it applied, so as to cover all situations, including indirect ones, in which actions led to source exposure. The law would also need to define very carefully what exactly those covered by source protection are due (or what rights they exercise), along the lines of not being required to divulge the identity of their confidential source (i.e. it would need to create specific rights, as opposed to simply establishing principles). In a related vein, the law would need to include a number of procedural rules, such as about informing those covered by their right not to disclose a source and about how to bring an action for source disclosure before a court.

FLIP’s Pedro Varca Villareal said that while there are already penalties for unlawful surveillance activity in Colombia, “...it could be very interesting to penalise with the particular aim of punishing violations of professional secrecy”. But he cautioned about the need for training and education. “Often, professional secrecy tends to be violated by public officials (police or judicial officials). To avoid creating a tension between State powers, this could be implemented if and only if accompanied by training processes (for) officials. In many cases these officials do not understand the scope of the confidentiality of sources and the penalties would be disproportionate without previous pedagogical exercises accompanying them”.

2. Other principles emerging from the thematic study underpinning this research

a. Desirability of explicit referencing of source protection in constitutional and nationally-applicable law

Former Special Rapporteur with the Inter-American Commission on Human Rights Catalina Botero made the point that constitutional protection of journalists’ sources is desirable “... having this in the constitution is good ... because you need a very clear instruction for the judicial power not to do things that can threaten journalism, for example allowing the state to spy on journalists”.

This was a view echoed by Australian Constitutional Law expert, Professor George Williams. Given the absence of solid constitutional protections for freedom of expression, or an over-riding piece of legislation at the Federal level in Australia, the introduction of new laws pertaining to data retention and the criminalisation of aspects of national security reporting have alarmed him with respect to source protection:

...what we need is not only specific defences but a more generic statute or protection that applies to journalist rights and freedom of speech more generally. ... Given we do not have a bill of rights, and probably aren’t getting one soon, an alternative would be...a federal statute that specifically provides for those rights that would be used to trump, or at least interpret other statutes.

b. *Recognition that metadata should also be treated as confidential information by third parties and State actors*

Metadata can be used to pinpoint journalists' interactions with their sources even when, for example, the contents of emails or telephone conversations may remain secret.

Digital communications lawyer Leanne O'Donnell commented:

A lot of the privilege laws concentrate on the content, whereas what we've learned over the last couple of years is that just as invasive or revealing is the data around that content – the fact that you looked at 'x' websites and you called that phone number and the time you did those things. The data that sits around communications can be just as revealing about patterns and associations, relationships and identity. I think we are going to get to the stage where we are going to have to really grapple with how we protect that data as much as the content.

c. *Transparency clause proposed*

Although this issue is partially covered under draft principle 7 above, ("Define an independent judicial process, with appeal potential, for authorised exceptions"), some respondents wished to push it further. For example, Alan Rusbridger proposed a transparency provision whereby journalists are informed when there is a request from authorities to access their data. "... (I)f they're going to go and look at journalists' material then they have an obligation to tell the journalist... a policeman might not be the best judge of whether something imperils a source".

Indicative of the difficulty around the issue is the argument of the former British Transport Police chief constable Andy Trotter, who spoke at a City University London debate in March 2015. He rejected the suggestion that news organisations should be given the opportunity to argue the case against the disclosure of journalists' call records. "If one is investigating a journalist, it is like we are investigating any potential criminal – we don't normally notify them that's what we are going to do (Ponsford 2015b). A similar point was made during the debate by former senior civil servant Sir David Omand, who was involved in drafting the Regulation of Investigatory Powers Act (RIPA) surveillance legislation. He said he believed there was no possibility of notifying journalists about requests to view their phone records, in part because foreign spies often pose as journalists.

On the other hand, there is a distinction between investigating a journalist who is doing his or her job, and investigating a third party. It is also evident that even in the absence of transparency in certain cases, there can still be rules that place limits on the requisitioning of data, and there can still be a form of adversarial framing built into the process.

d. *Shield individuals engaged in acts of journalism from targeted surveillance, data retention and handover, and data pertaining to their work netted by mass surveillance (other than in very narrowly defined exceptional circumstances).*

Alan Rusbridger urged such protections, as did Australian digital communications lawyer Leanne O'Donnell. But she also acknowledged the practical challenges of implementation: "...it would require those law enforcement agencies to do the right thing because...on a practical level, the ISP who is receiving that request is not going to know that Joe Boggs is a journalist, or that Joe Bloggs is a source. So it would require the law enforcement agency not to make those requests in those categories of communications".

Privacy International's Thomas Falchetto pointed to international examples where such limitations and exemptions are in effect, although only a few countries specifically limit the use of surveillance to identify sources or other protected materials. "The Belgian Law on Protection of Journalists' Sources prohibits the use of 'any detection measure or investigative measure' of any protected media person, unless it is authorised by a judge under the same restrictions as are required to compel a journalist to reveal her source of information". Falchetto made reference to the Council of Europe (CoE) Committee of Ministers 2000 recommendation on 'The Right of Journalists Not to Disclose Their Sources of Information', which deals with journalistic exclusions regarding surveillance and data retention. According to this, Principle 6 (Interception of communication, surveillance and judicial search and seizure) states:

a. The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:

i. interception orders or actions concerning communication or correspondence of journalists or their employers,

ii. surveillance orders or actions concerning journalists, their contacts or their employers, or

iii. search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

b. Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

The CoE Principle 3 referred to here defines parameters around to the right of non-disclosure. It specifies that in determining whether a legitimate interest in a disclosure outweighs the public interest in not disclosing information identifying a source, the competent authorities should pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights. A disclosure should only be ordered if there is "an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature". Principle 3 further states that the disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure.

However, Toby Mendel opposed the inclusion of a principle in the draft framework that would exempt journalists from surveillance or data retention provisions, saying this was neither possible nor reasonable. "Source protection has never been understood as protecting journalists against ordinary criminal law processes, and it would not be justifiable to suggest this. Given the broad nature of any reasonable definition of a journalist, if we were to protect them against surveillance, anyone who wished to engage in terrorist activity could easily bring themselves within that definition. Rather than look at it from this angle, I think the proper solution, at least in democracies, is to enhance the legal and oversight controls over surveillance".

The issue that emerges from this discussion concerns the feasibility and desirability of not intercepting or collecting private journalistic data (or metadata), as well as the distinct issue of limitations on the use of the data that is collected so as to ensure a high level of confidentiality and protection. The general principle, however, maintains protection of confidentiality of sources for acts of journalism as an aspiration in relation to both targeted surveillance and mass surveillance, as well as data retention and rendition, and it points to the value of legal process and narrow conditions being required if confidentiality is to be legitimately compromised.

e. *Complementarity of source protection laws with whistleblower legislation*

Many of the experts interviewed indicated the need for recognition of parallel whistleblower laws to strengthen the legal framework for source protection. "In the places where we don't have them, we should start with that. And, it's not specifically journalists' protections, but more broadly whistleblower protections, because whistleblower protection laws do help," Javier Garza said.

Henry Maina said: "...if the sources understand that there is protection of whistleblowers, then those two would go hand-in-hand. Where journalists are seeking to have protection of their sources, the best point of entry is to have whistleblower protection, as opposed to making arguments as journalists". He added: "When you begin to think of it as whistleblowers are protected, then you can, as a person who has received this information, seek protection of your source".

However Josh Stearns expressed reservations: "In an ideal world where a whistleblower law was written to include whistleblowing to the press, it could work. But where the rubber meets the road I have a hard time seeing that actually play out in practice. ...I also think that there may be philosophical and legal distinctions to be made between the protection of a journalist to gather and disseminate news, versus the rights of someone to reveal wrongdoing that they are witnessing".

f. *The need for source protection laws to apply across all mediums*

All of the interviewees agreed that source protection laws needed to explicitly encompass digital media to avoid emerging disparities that have resulted in analogue data (e.g. reporters' notepads) being protected, while digital data (e.g. a journalist's hard drive or smartphone) is not protected. "Traditionally when we have thought about how to protect sources, especially in law through things like shield laws, it's been very analogue in focus, and the new world that we live in - in terms of digital surveillance and security - makes a lot of those shield laws problematically dated in some ways," Josh Stearns said.

g. *The need to revise existing laws*

The Media Legal Defence Institute's Peter Noorlander called for amendments to existing legal frameworks, along with strategic litigation, to ensure their effectiveness in the digital era:

Existing national security and search and seizure laws should be amended to strengthen source protection, and it should be made clear in those countries where it is not yet (the case) that source protection is part and parcel of the constitutional right to freedom of expression. Currently this is the case only in European countries, and even there constitutional source

protection is being undermined, so this will be a large task and take some sustained and combined effort of lobbying and strategic litigation.

Silvia Higuera said that States needed to be convinced to give journalists working in digital environments “the same protection they had in the other mass media”.

This was a point also made by one respondent to the survey attached to this Study. Sudanese journalist Liemia Eljaili Abubkr said that source protection laws should be revised to “include articles protecting journalists on the Internet (to ensure that they are not subjected to) criminal punishment” (Abubkr 2014). She also called for the criminalisation of “hacking, spying, filtering and following journalists’ communication”.

h. Internationally relevant actions

Several interviewees promoted the idea of international-level legal support for source protection. FLIP’s Pedro Varca Villareal was among them:

In our opinion these issues are easier to promote if they have international support at the level of a treaty, commemoration in the form of an international day, or the creation of recommendations. It may also have a greater impact if this issue, among others related to fundamental rights on the Internet, were included in exercises such as the Universal Periodic Review of the Human Rights Committee of the United Nations.

Charles Tobin said that treaties and conventions can be very helpful to furthering an international culture where free speech is valued. Bolivian investigative journalist Ricardo Aguilar highlighted the interdependence of secure source protection and development: “Considering the undeniable fact that the confidentiality of the source is a key for access to information and freedom of the press, then its protection far exceeds the mere defence of democratic values and inclusively involves the development of countries”.

i. The need to educate civil servants, law enforcement agents and the judiciary in the purpose and value of legal source protection frameworks:

As he argued for in the case of draft principle 8 above, Pedro Vaca Villareal highlighted the importance of including in a framework whether there are measures for promotion, training and awareness, especially with the judiciary and law enforcement. The main problem he said “is the lack of knowledge of legislators and judges regarding the impact of technological surveillance. Beyond these policy changes, it is essential that policies and awareness training of staff are included”.

3. Revised 11 Principles for assessing legal source protection frameworks internationally

The following principles represent the research-informed augmentation and expansion of the eight-framework principles originally proposed for expert review, taking into account the feedback of the experts. Accordingly, a robust and comprehensive source protection framework would encompass the need to:

1. Recognise the value to the public interest of source protection, with its legal foundation in the right to freedom of expression (including press freedom), and to privacy. These protections should also be embedded within a country’s constitution and/or national law,

2. Recognise that source protection should extend to all acts of journalism and across all platforms, services and mediums (of data storage and publication), and that it includes digital data and meta-data,
3. Recognise that source protection does not entail registration or licensing of practitioners of journalism,
4. Recognise the potential detrimental impact on public interest journalism, and on society, of source-related information being caught up in bulk data recording, tracking, storage and collection,
5. Affirm that State and corporate actors (including third party intermediaries), who capture journalistic digital data must treat it confidentially (acknowledging also the desirability of the storage and use of such data being consistent with the general right to privacy),
6. Shield acts of journalism from targeted surveillance, data retention and handover of material connected to confidential sources,
7. Define exceptions to all the above very narrowly, so as to preserve the principle of source protection as the effective norm and standard,
8. Define exceptions as needing to conform to a provision of “necessity” and “proportionality”—in other words, when no alternative to disclosure is possible, when there is greater public interest in disclosure than in protection, and when the terms and extent of disclosure still preserve confidentiality as much as possible,
9. Define a transparent and independent judicial process with appeal potential for authorised exceptions, and ensure that law-enforcement agents and judicial actors are educated about the principles involved,
10. Criminalise arbitrary, unauthorised and willful violations of confidentiality of sources by third party actors,
11. Recognise that source protection laws can be strengthened by complementary whistleblower legislation.

Further research could develop a repository of examples of model laws and exemplar judgements that address the issues of ‘exceptions’ and ‘necessity’ provisions. A summary of such could be appended to this model assessment framework.

8. Gender Dimensions Arising

Women journalists face additional risks in the course of their work – on and offline. In the physical realm, these risks can include sexual harassment, physical assault and rape. In the digital sphere, acts of harassment and threats of violence are rampant. Similarly, female sources face increased risks when acting as whistleblowers or confidential informants.

These issues manifest in several ways as regards the issue of source protection in the digital era:

1. Women journalists face greater risks in dealing with confidential sources
2. Women sources face greater physical risks in encounters with journalists and in revealing confidential information
3. The physical risks confronted by women journalists and sources in the course of confidential communications may require reliance on digital communications
4. Secure digital communications defences, including encryption, are arguably even more necessary for female journalists and sources

Specific factors for consideration

1. Female journalists and sources need to be able to communicate digitally

Female journalists working in the context of reporting conflict and organised crime are particularly vulnerable to physical attacks, including sexual assault, and harassment. In some contexts, their physical mobility may be restricted due to overt threats to their safety, or as a result of cultural prohibitions on women's conduct in public, including meeting privately with male sources. Therefore, women journalists need to be able to rely on secure non-physical means of communication with their sources.

Women sources may face the same physical risks outlined above – especially if their journalistic contact is male and/or they experience cultural restrictions, or they are working in conflict zones.

Additionally, female confidential sources who are domestic abuse victims may be physically unable to leave their homes, and therefore be reliant on digital communications.

These factors present additional challenges for women journalists and sources, in regard to maintaining confidentiality in the digital era.

2. Digital safety and security are paramount for both female journalists and sources

Women journalists need to be able to rely on secure digital communications to ensure that they are not at increased risk in conflict zones, or when working on dangerous stories, such as those about corruption and crime. The ability to covertly intercept and analyse journalistic communications with sources increases the physical risk to both women journalists and their sources in such contexts. Encrypted communications and other defensive measures

are therefore of great importance to ensure that their movements are not tracked and the identity of the source remains confidential.

The risks of exposure for confidential sources are magnified for female whistleblowers. Therefore, they need to be able to have access to secure secure digital communications methods to ensure that they are at minimum risk of detection and unmasking. They also need to have confidence in the ability to make secure contact with journalists to ensure that stories affecting women are told – secure digital communications can be an enabler for women's participation in public interest journalism. They can also help to avoid magnifying the 'chilling' of investigative journalism dependent upon female confidential sources. Also needed are strong legal protections for confidentiality, which are applied in a gender-sensitive manner - especially in regard to judicial orders compelling disclosure.

3. Online harassment and threats

Journalists and sources using the Internet or mobile apps to communicate face greater risk of gendered harassment and threats of violence. These risks need to be understood and mitigated to avoid further chilling women's involvement in journalism – as practitioners or sources.

4. Summary

Strong source protection laws which respond to the challenges of the digital age discussed at length in this Study can help to avoid the chilling of women's involvement in investigative journalism that is dependent upon confidential sources. They can assist in empowering women's participation in accountability reporting that addresses social and development needs, such as systemic failures in public utilities and services, corruption and organised crime.

9. Protecting Journalism Sources in the Digital Age: Conclusion

The legal frameworks that support protection of journalists' sources - at international, regional and country levels - are under significant strain in the digital era. In many of the countries studied, frameworks are being affected by national security, anti-terrorism and data retention legislation that overrides source protection laws, or they risk being undercut by arbitrary surveillance and mass surveillance (Hughes 2012; Learner & Bar Nissim 2014). Other threats arise due to pressure being applied to third party intermediaries to release data that risk exposing sources. There are also increasing challenges to technical measures that support confidentiality, such as limits on anonymity, and moves to outlaw encryption.

Furthermore, there is the question of entitlement to protection: in an era where citizens and other social communicators have the capacity to publish directly to their own audiences, and those sharing information in the public interest are recognised as legitimate journalistic actors by the United Nations, to whom should source protection laws apply? On the one hand, broadening the legal definition of 'journalist' to ensure adequate protection for citizen reporters (working on and offline) is desirable, and case law is catching up gradually on this issue of redefinition. However, on the other hand, it opens up debates about licensing and registering those who do journalism and who wish to be recognised for protection of their sources. This is why the key tests in contemporary society for access to source protection laws are evolving towards the definition and identification of 'acts of journalism', rather than occupational or professional descriptors.

Journalists and news organisations are in the process of adapting their practices - strengthening digital security and reverting to pre-digital era methods of communication with confidential sources. But unless individual States and regional bodies revise and strengthen their legal source protection frameworks, journalists adapting reporting methods and reverting to analogue 'basics' (an option not always practically feasible, especially, as argued above, for many of the women who do journalism) will not be enough to preserve source protection in the digital age. In an era of technologically advanced spy-craft, it is also necessary for States to review surveillance practises and oversight in line with UN General Assembly resolutions on privacy. In addition, source confidentiality requires limits to data retention and rendition laws, improved accountability and transparency measures (applied to both states and corporations in regard to journalistic data), and exemptions for journalistic acts in relation to over-riding national security legislation.

This study has shown that the issue of the confidentiality of journalism sources in the digital age is at the nexus of many intersecting issues. This situation calls out for revision of existing dispensations, and the introduction of new ones, and an 11-point framework has been advanced to assist in the process. If attention is not given to the new complexities, the institution of source confidentiality will face increasing risks with the deepening of the digital age.

10. Recommendations

At UNESCO, Member States could:

1. Consider framing an explicit resolution that calls on Member States to review and update (as necessitated) their legal frameworks for journalistic source protection drawing on the framework proposed in Thematic Study 3 to ensure their efficacy in the digital era
2. Request support to Member States who wish to adopt and/or review legal frameworks for protecting the confidentiality of journalistic sources in the new conditions
3. Assess source confidentiality issues in submissions to the Universal Periodic Review of the UN Human Rights Committee
4. Support regional workshops, in collaboration with media and civil society, designed to equip digital communicators and journalistic actors with knowledge, skills and the opportunity to collaborate on the challenges and solutions to the issues raised in this study, with regard to continuing investigative journalism practice
5. Consider, where requested, to use this study to help support training of the judiciary, police and civil servants within Member States to ensure that they are adequately educated about the value of legal source protection frameworks.

Individual member States could consider:

1. Applying the proposed framework in Thematic Study 3 above, assessing their own legal source protection dispensations against its provisions
2. Legislating for source protection that extends to digital communications and publishing, and to all acts of journalism in the public interest
3. Ensuring that legislation designed to address national security and crime concerns does not override source protection laws other than in narrowly defined exceptional circumstances
4. Ensuring that surveillance (mass and targeted), and mandatory data retention policies do not undercut legal source confidentiality protection frameworks
5. Working with journalists' organisations and civil society groups to monitor the impacts of the potential corrosive effects on source protection identified in this Study, especially in order to ensure that investigative journalism dependent upon confidential sources is able to continue
6. Consider the applicability of good international practice, including, for instance, the Council of Europe Parliamentary Assembly Recommendation 1950 on the protection of journalists' sources (CoE 2011) which encourages states to:

- *Legislate for source protection*

- *Review their national laws on surveillance, anti-terrorism, data retention, and access to telecommunications records*
- *Co-operate with journalists' and media freedom organisations to produce guidelines for prosecutors and police officers, and training materials for judges on the right of journalists not to disclose their sources.*
- *Develop guidelines for public authorities and private service providers concerning the protection of the confidentiality of journalists' sources in the context of the interception or disclosure of computer data and traffic data of computer networks*
- *Applying source protection regimes and defined exceptions in a gender-sensitive way*

Recommendations for media actors and other producers of journalism:

1. Engage with digital issues impacting on source confidentiality protection, and actively campaign for laws and rules that provide adequate protection
2. Explain to the public what is at stake in the protection of source confidentiality, especially in the digital age
3. Ensure that sources are aware of the digital era threats to confidentiality
4. Consider altering practices – including 'going back to analogue methods' when required (recognising this may not always be possible due to international or gender dynamics) – in order to offer a degree of protection to their confidential sources
5. Help audiences become more secure in their own communications, for example explaining how encryption works, and why it is important not to have communications security compromised
6. Consider providing technical advice and training to sources to ensure secure communications, with the assistance of NGOs and representative organisations
7. In the case of media leaders, ensure that they also respect their journalists' ethical commitment (and in some cases legal obligation) to source confidentiality
8. In the case of media owners, ensure that their journalists, and freelancers who contribute investigative reports, have access to the appropriate tools and training needed to ensure that they are able to offer the most secure channels of digital communication possible to their sources

Recommendations for civil society

1. Advocate, for robust source protection frameworks in line with that described in Thematic Study 3 above
2. Invest in, and partner with, news publishers and academia to research and develop new tools to aid secure digital communication between journalistic actors and their sources

3. Assist in training and implementation of digital security tools among journalistic actors and whistleblowers
4. Work with UNESCO and other UN actors and Governments to develop complementary whistleblower regimes
5. Assisting in training in digital source protection solutions for both journalists and their sources

General recommendations for multiple stakeholders

1. There should be further research into the impacts of the digital era on source protection in Member States which are not included in this Study's methodological approach
2. Consideration could be given to bi-annual source protection research mapping exercises to build on, and maintain the relevance of, this benchmark global study
3. An international conference/symposium could be convened on the implications of the digital age for legal source protection frameworks internationally
4. There should be further research to develop a repository of examples of model laws and exemplar judgements that address the issues of 'exceptions' and 'necessity' provisions. A summary of such could be appended to the model assessment framework, as identified as desirable in Thematic Study 3.
5. Support should be given to developing an online repository for the specific purpose of making centrally available data on legal and environmental challenges to source protection efficacy within Member States. This could be orchestrated collaboratively with a range of civil society groups via a crowd-mapping exercise

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Appendices

Appendix 1: List of experts accessed for qualitative interviews*

	Interviewee	Title/Expertise	Gender	Region/ Country	Interviewer
1.	Charles Tobin	Legal expert, attorney	Male	Europe/North America (US)	Julie Posetti
2	Gavin Millar QC	Media law expert, Queens Counsel (QC)	Male	Europe/North America (UK)	Julie Posetti
3	Dr Courtney Radsch	Committee to Protect Journalists, Advocacy Director	Female	Europe/North America (US)/ GLOBAL	Julie Posetti
4	Alan Rusbridger	Editor-in-Chief <i>The Guardian</i>	Male	Europe/North America (UK)	Julie Posetti
5	Gerard Ryle	Director International Consortium of Investigative Journalists (ICIJ)	Male	Europe/North America (US)/ GLOBAL	Julie Posetti
6	Marty Baron	Editor-in-Chief, The Washington Post	Male	Europe/North America (US)	Julie Posetti
7	Marites Danguilan Vitug	Philippines Centre for Investigative Journalism	Female	Asia/Pacific (Philippines)	Angelique Lu
8	Peter Noorlander	Media Lawyer, Media Legal Defence Initiative (MLDI)	Male	Europe/North America (UK)/ GLOBAL	Emma Goodman
9	Jillian York	Executive Director, Electronic Frontier Foundation (EFF)	Female	Europe/North America/ GLOBAL	Farah Wael
10	Susan E McGregor	Tow Centre, Columbia University (academic)	Female	Europe/North America (US)	Angelique Lu
11	Fredrik Laurin (two interviews conducted)	Director Investigative Unit, Swedish Public Radio (SR)	Male	Europe/North America (Sweden)	Federica Cherubini Angelique Lu & Julie Posetti

12	Gunnar Nygren	Professor, Journalism, Södertörn University	Male	Europe/North America (Sweden)	Angelique Lu
13	Amare Aregawi	Journalist	Male	Africa (Ethiopia)	Federica Cherubini
14	Prof Dirk Voorhoof	Media-Law academic, University of Ghent	Male	Europe/North America (Belgium)	Federica Cherubini
15	Umar Cheema	Investigative journalist/ Co-founder Pakistan Centre for Investigative Reporting	Male	Asia/Pacific (Pakistan)	Federica Cherubini
16	George Williams SC	Constitutional law expert, University of NSW	Male	Asia/Pacific (Australia)	Marcus O'Donnell
17	Prof Wendy Bacon	Journalism academic/ investigative journalist/ Australian Centre for Independent Journalism	Female	Asia/Pacific (Australia)	Marcus O'Donnell
18	Peter Bartlett QC	Media lawyer, barrister	Male	Asia/Pacific (Australia)	Marcus O'Donnell
19	Leanne O'Donnell	Digital media lawyer	Female	Asia/Pacific (Australia)	Marcus O'Donnell
20	Josh Stearns	Journalist/Press freedom activist	Male	Europe/North America (US)	Marcus O'Donnell
21	Toby Mendel	Centre for Law and Democracy, Director	Male	Europe/North America (Canada)/ Global	Marcus O'Donnell
22	Tomaso Falchetta	Privacy International, legal policy officer	Male	Europe/North America (UK)/ Global	Emma Goodman
23	Julie Owono	Internet Without Borders	Female	Africa (Cameroon)/ Global	Federica Cherubini
24	Dr Justine Limpitlaw	Legal expert	Female	Africa (South Africa)	Angelique Lu
25	Javier Gaza Ramos	Journalism security & safety expert	Male	Latin America (Mexico)	Jake Evans

26	Rana Sabbagh	Investigative journalist/ Executive Director, Arab Reporters for Investigative Journalism (ARIJ)	Female	Arab States (Jordan)/ Regional	Farah Wael
27	Anita Vahlberg	Senior Advisor, Swedish Union of Journalists	Female	Europe/North America (Sweden)	Angelique Lu/Julie Posetti
28	Pär Trehörning	Lawyer advising Swedish Union of Journalists/Press Ombudsman	Male	Europe/North America (Sweden)	Angelique Lu/Julie Posetti
29	Katarina Berglund-Siegbahn	Constitutional Law Expert, Swedish Department of Justice	Female	Europe/North America (Sweden)	Julie Posetti
30	Toyosi Ogunseye	Investigative journalist, The Star	Female	Africa (Nigeria)	Federica Cherubini
31	Marcelo Rech	Globo RBS, Director of Journalism/Chair, World Editors Forum	Male	Latin America (Brazil)	Julie Posetti
32	Prof Ronaldo Lemos	Director of the institute for technology and society of Rio de Janeiro (ITS) and a law professor at the Rio de Janeiro State University	Male	Latin America (Brazil)	Carlos Affonso Souza
33	Carlos Guyot	Editor-in-Chief, La Nacion	Male	Latin America (Argentina)	Alice Matthews
34	Pedro Vaca Villareal	Executive Director Ejecutivo en Fundación para la Libertad de Prensa (FLIP)	Male	Latin America (Colombia)	Alice Matthews
35	Dr Catalina Botero	Special Rapporteur Freedom of Expression: Inter-American Commission on HR; lawyer	Female	Latin America (Columbia)/ Regional expert	Alice Matthews
36	Zine Cherfaoui	Editor-in-Chief Al Watan	Male	Arab States (Algeria)	Alexandra Waldhorn

37	Rawda Ahmed	Arabic Network for Human Rights & Information	Female	Arab States (Egypt)	Alexandra Waldhorn
38	Cliff Buddle	Senior Editor South China Morning Post	Male	Asia/Pacific, China (Hong Kong)	Doreen Weisenhaus
39	Daoud Kuttab	Journalist	Male	Arab States (Jordan)/	Alexandra Waldhorn
40	Rasha Abdulla	Professor Media Studies American University Cairo	Female	Arab States (Egypt)	Alexandra Waldhorn
41	Prof Wei Yong Zheng	Professor of Media Law at the University of China in Beijing	Male	Asia/Pacific (China)	Ying Chan
42	Mahasen Al Eman	Director Arab Women's Media Centre	Female	Arab States (Jordan)/	Alexandra Waldhorn
43	Ricardo Aguilar	Investigative Journalist, La Razon	Male	Latin America (Bolivia)	Alice Matthews
44	Silvia Higuera	Knight Centre for the Americas	Female	Latin America (Columbia)/	Alice Matthews
45	Henry Maina	Article 19, East Africa	Male	Africa (Kenya)	Alexandra Waldhorn
46	Yuan Zhen (pseudonym)	Editor-in-Chief (Un-named newspaper)	Male	ASIA/Pacific (China)	Ying Chan
47	Yves Eudes	Investigative journalist/Le Monde; Co-founder SourceSure	Male	Europe/North America (France)	Alexandra Sazanova-Prokrouan
48	Atanas Tchobanov	Editor-in-Chief, Bivol/Balkanleaks	Male	Europe/North America (Bulgaria)	Alexandra Sazanova-Prokrouan
49	Prof Hans-Gunnar Axberger	Professor of Constitutional Law at the University of Uppsala	Male	Europe/North America (Sweden)	Caroline Hammarberg

* Designations correct at mid-2015

** Gender breakdown: 44% female

Appendix 2: List of review panel members^{24*} ^{25**}

REVIEW PANEL MEMBER	AFFILIATION
1. Professor Mark Pearson (media law/digital journalism expert)	Griffith University AUSTRALIA
2. Dr Julie Reid (media studies in Africa expert)	UNISA (University of South Africa) SOUTH AFRICA
3. Lillian Nalwoga (African ICT policy expert)	President of the Internet Society's Uganda Chapter; Policy Officer at the Collaboration on International ICT Policy in East and Southern Africa (CIPEA); coordinator of the Uganda and East African Internet Governance Forums. UGANDA
4. Dan Gillmor (journalism professor and international digital media expert)	Dan Gillmor is Professor of Practice, Walter Cronkite School of Journalism and Mass Communication, Arizona State University. UNITED STATES OF AMERICA
5. Prisca Orsonneau (barrister, legal expert in press freedom matters)	Lawyer at the Paris Bar, specializing in Media Law and Human Rights. Chair of the Reporters Without Borders Legal Committee. FRANCE
6. Gayathry Venkiteswaran (Press organization representative)	Executive Director, Southeast Asian Press Alliance THAILAND
7. Mario Calabresi (newspaper editor)	Editor-in-Chief, La Stampa; World Editors Forum board member ITALY
8. Mishi Choudhary (international digital law expert)	Legal Director, Software Freedom Law Centre and SFLC.in INDIA

²⁴ * Designations as at mid-2015

²⁵ ** Gender breakdown: 63% female

UNESCO Series on Internet Freedom (cont.)



Fostering freedom online: the role of internet intermediaries

With the rise of Internet intermediaries that play a mediating role between authors of content and audiences on the internet, this UNESCO publication provides in-depth case studies and analysis on how internet intermediaries impact on freedom of expression and associated fundamental rights such as privacy. It also offers policy recommendations on how intermediaries and states can improve respect for internet users' right to freedom of expression.



Global survey on internet privacy and freedom of expression

This publication seeks to identify the relationship between freedom of expression and Internet privacy, assessing where they support or compete with each other in different circumstances. The book maps out the issues in the current regulatory landscape of Internet privacy from the viewpoint of freedom of expression. It provides an overview of legal protection, self-regulatory guidelines, normative challenges, and case studies relating to the topic.



Freedom of connection, freedom of expression: the changing legal and regulatory ecology shaping the Internet

This report provides a new perspective on the social and political dynamics behind the threats to expression. It develops a conceptual framework on the 'ecology of freedom of expression' for discussing the broad context of policy and practice that should be taken into consideration in discussions of this issue.

All publications can be downloaded at:

<http://www.unesco.org/new/en/communication-and-information/crosscutting-priorities/unesco-internet-study/>

Protecting Journalism Sources in the Digital Age

This comprehensive study highlights changes that impact on legal frameworks that support protection of journalistic sources in the digital age. This research responds in part to a UNESCO resolution by the 38th General Conference held in 2015 as well as the CONNECTing the Dots Outcome Document adopted by our 195 Member States that same year.

While the rapidly emerging digital environment offers great opportunities for journalists to investigate and report information in the public interest, it also poses particular challenges regarding the privacy and safety of journalistic sources. These challenges include: mass surveillance as well as targeted surveillance; data retention; expanded and broad anti-terrorism measures and national security laws; and over-reach in the application of these. All these can undermine the confidentiality protection of those who collaborate with journalists, and who are essential for revealing sensitive information in the public interest but who could expose themselves to serious risks and pressures. The challenges chill whistle-blowing and thereby undermine public access to information and the democratic role of the media. In turn this jeopardizes the sustainability of quality journalism.

The present research provides a comprehensive review of developments that can impact on the legal frameworks that support protection of journalistic sources. Interviews, panel discussions, thematic studies and a review panel ensured the input of legal and media experts, journalists and scholars. The study provides recommendations for the future of journalistic source protection.



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